SUPREME COURT, U.S.
FILED
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DARRYL J. ROBERTS,
Petitioner,

v.

BEULAH B. WOOTON, ADMINISTRATRIX
OF THE ESTATE OF ROBERT O. WOOTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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47108

QUESTION PRESENTED

Beulah B. Wooton, as administratrix of the Estate of Robert O. Wooton, filed a complaint in 1994 on a cause of action that arose in 1972. In the Circuit Court of Raleigh County, West Virginia, Darryl J. Roberts, a resident of Arizona, made a motion for directed verdict at the end of the Wooton's case for the circuit court to find that the Wooton's claim was time barred by all possible statutes of limitations. The circuit court granted this motion. The Supreme Court of Appeals of West Virginia reversed the directed verdict and remanded the case back to the circuit court.

Has the Supreme Court of Appeals of West Virginia denied Petitioner his due process right to a meaningful hearing as required under the Fourteenth Amendment of the United States Constitution because it refused to enforce the statute of limitations which vested in him the right to a complete defense to a claim at least twenty-two years old and because it created an exception to the statute where none was provided by the legislature by remanding a case in which Respondent presented no evidence to justify tolling the limitations period.

PARTIES TO THE PROCEEDING

Petitioner

Darryl J. Roberts

Respondent

Beulah B. Wooton, Administratrix of the Estate of Robert O. Wooton

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PETITION FOR WRIT OF CERTIORARI

Darryl J. Roberts respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Appeals of West Virginia entered in this proceeding on August 9, 1999, in order to decide whether the Supreme Court of Appeals of West Virginia has violated his constitutional right to due process under the Fourteen Amendment of the United States Constitution.

OPINIONS BELOW

The order of the Supreme Court of Appeals of West Virginia that gives rise to this petition was entered on August 9, 1999. This order is reprinted in the Appendix at Appendix A at 1a-3a. The opinion underlying this order will be published in the South Eastern Reporter, Second Edition, and a copy of the opinion is reprinted in the Appendix at Appendix B at 4a-16a. The final order of the Circuit Court of Raleigh County ordered the Petitioner's motion for directed verdict be granted. This order is reprinted in the Appendix at Appendix C at 17a-23a.

JURISDICTION

This Petition for Writ of Certiorari is filed within 90 days of the Supreme Court of Appeals of West Virginia's order entered August 9, 1999. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const., amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

W. Va. Code § 55-2-12

Every personal action for which no limitations otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.

STATEMENT OF THE CASE

The crux of this case is the State's interpretation of West Virginia's statute of limitations found in W. Va. Code § 55-2-12 and the established rules of law construing the word "accrued" within that statute. The parties to this case agree that the applicable statute of limitations dictates that the cause of action shall be brought "[w]ithin two years next after the right to bring the same shall have accrued." W. Va. Code § 55-2-12. West Virginia has defined the point at which the cause of action shall have "accrued" in the following manner:

> Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the "discovery rule," the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of the claim." App. B at 5a (citing Syllabus Point 2, Gaither v. City Hosp., Inc., 487 S.E.2d 901 (1997)).
>
> The "discovery rule" is generally applicable to all torts, unless there is a clear statutory prohibition of its application." App. B at 5a (citing Syllabus Point 3, Gaither v. City Hosp., Inc., 487 S.E.2d 901 (1997)).
>
> Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." App. B at 5a (citing Syllabus Point 3, Cart v. Marcum, 423 S.E2d 644 (1992)).

The facts center around Robert Wooton's, as an employee of Associated Cemetery Estates, Inc.[1] ("ACE"), being offered the opportunity to purchase 400 shares ("Shares") of ACE stock by Chester Roberts, a primary owner of ACE. App. B at 7a. Robert Wooton accepted this offer on January 4, 1960, and signed a promissory note

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[1] Legacy One is the successor corporation to ACE.

("Note") to pay for the Shares. Id. The Note promised the payment of $8,000.00 in ten equal installments at an annual interest rate of four percent, and the Shares were held by Chester Roberts as collateral for the Note. Id. at 8a. Robert Wooton died on March 8, 1969. Id.

On October 8, 1971, Beulah Wooton, the widow of Robert Wooton, received a letter from Chester Roberts informing her that her husband had been in default of the Note at the time of his death for failure to make payment and offering a check in the amount of $4,000.00 to purchase the equity in the Shares. Id. Beulah Wooton did not cash or return the check. Id.

On March 27, 1972, Chester Roberts informed the secretary of ACE that he had purchased Robert Wooton's Shares and requested a new stock certificate to be issued in his name for the Shares. Id. at 8a. The secretary issued this new certificate, which Chester Roberts then gifted to Darryl Roberts, his son and a resident of Arizona, in 1976. Id. at 9a. Chester Roberts died in 1980. Id. Darryl Roberts subsequently gifted these Shares to his wife in 1987, and they were sold to Stewart Enterprises, Inc. in 1994.

Upon his father's death, Darryl Roberts became president and chief executive officer of ACE, and in January 1985, Darryl Roberts sent a letter to Bill Wooton. Id. at 9a; App. E at 27a. Bill Wooton is one of the sons of Robert Wooton, a West Virginia State Senator and Chairman of the West Virginia Senate Finance Committee. In the letter, Darryl Roberts discussed his father's purchase of the Shares and Robert Wooton's default on the Note. App. E at 27a. Darryl Roberts also renewed his father's offer to pay $4,000.00 plus five percent per year since his father's offer was first made. App. B at 9a; App. E at 28a. Bill Wooton

forwarded this offer to his brother, James Wooton, also an attorney. App. B at 9a. James Wooton responded with a counter-offer; Darryl Roberts rejected the counter-offer and reinstated his previous offer. Id.

On June 3, 1986, Bill Wooton acquired shares of ACE, now Legacy One. Id. He then executed under oath a Legacy One Shareholders' Agreement which was by and between Legacy One and all the Shareholders. Id. at 10a; App. D at 24a-26a. A provision of the Agreement listed all the shareholders' names. Id. Neither Robert Wooton's name nor his estate's was on this agreement. Id.

Settlement negotiations continued through 1994. In November 1994, Beulah Wooton was named Administratrix of Robert Wooton's estate, and she filed a complaint against Darryl Roberts and Legacy One. App. B at 10a. At the close of the Respondent's case, Petitioner and Legacy One moved for directed verdict based on the running of the statutes of limitations. The judge of the Circuit Court of Raleigh County granted the motion finding that Respondent knew or should have known of the causes of action as of March 27, 1972, the date Chester Roberts took ownership of the Shares. App. C at 23a.

In his order the judge made the following findings of fact and conclusions of law. Although the correspondence in 1971 put Beulah Wooton on notice that her husband had been in default, March 27, 1972, was the critical date, as that was the date the Shares had been transferred to Chester Roberts. Id. at 19a. From that date, Beulah Wooton was on notice that the transfer had occurred because she did not enjoy any of the benefits associated with possession of the Shares and she had nothing that would indicate ownership or possession of the Shares. Id. at 20a. For example, she never received

notice of shareholders' meetings and she never received any dividend checks. Id. Although she claimed that she believed that dividends were being applied directly to the Note, this did not create an issue of fact as to whether she should have known that the Shares had been transferred. Id. at 20a-21a. The common law rules of discovery state that lack of action, lack of interest, or misunderstanding of the law does not create a discovery issue. Id. at 21a. For thirteen years and until 1985, the Wootons paid no attention to the Shares. When Darryl Roberts succeeded his father as president at ACE, he had to reconstruct the events that took place when Robert Wooton and Chester Roberts were alive. Id. at 21a; App. E at 27a. In 1985 and upon contact by Darryl Roberts, the Wootons began to make inquiries into the Shares, and James Wooton acted as agent to Beulah Wooton in settlement negotiations. App. C at 22a. James Wooton possessed enough information to know that either Chester Roberts or ACE had done something with the Shares. Id. The common law rules of discovery hold that mere ignorance of the existence of the cause of action or the identity of the wrongdoer does not prevent the running of the statute of limitations. Id. The discovery rule applies only when there is a strong showing that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury. Id. at 22a-23a. Because the court found no element of fraud nor any issue of fact that permitted the application of the discovery rule, the circuit court judge held that the statute of limitations had run and directed verdicts in favor of the Petitioner and Legacy One. Id. at 23a.

The Supreme Court of Appeals of West Virginia cited the same common law rules of discovery as the circuit court. It also cited the common law rule found in Syllabus Point 3, Stemple v. Dobson, 400 S.E.2d 561 (1990), that

> Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.

App. B at 5a. Although the judge of the Circuit Court of Raleigh County found that the Respondent did not present even a scintilla of evidence that Petitioner or Legacy One did something to prevent Respondent from knowing or inquiring into the status of the Shares, thus not presenting evidence sufficient to invoke the common law rule of discovery, App. C at 23a, the Supreme Court of Appeals of West Virginia found that the jury should decide the point in time when Respondent should have known that Petitioner claimed ownership of the Shares. App. B at 16a. Therefore, the Supreme Court of Appeals of West Virginia reversed the directed verdicts and remanded the case. App. A at 1a- 3a.

REASONS FOR GRANTING THE WRIT

The order of the Supreme Court of Appeals of West Virginia has violated the due process rights of Petitioner because it denied him the right to a meaningful hearing by refusing to enforce the statute of limitations as intended by the West Virginia State Legislature.

The order of the Supreme Court of Appeals of West Virginia violated Petitioner's constitutional right to due process of law under the Fourteenth Amendment of the United States Constitution because it refused to follow the well-

established statute of limitations. Certiorari is appropriate here because this refusal denied Petitioner the right to a hearing granted at a meaningful time and in a meaningful way appropriate to the nature of the case.

Although the concept of statutes of limitations is consistent with due process of law, these statutes must be enforced with consistency and with certainty. Courts are not permitted to selectively enforce statutes of limitations, and they are not permitted to make exceptions where none existed in the statute. To do so is to violate due process of law.

The enforcement of statutes of limitations is consistent with due process of law, because the states have an interest in providing repose to potential defendants and avoiding stale claims. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982); Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988). In the words of this Court:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary and their operation does not discriminate between the just and the unjust claim or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate.

Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945). See also Wilson v. Garcia, 471 U.S. 261, 271 (1985) ("In compelling circumstances, even wrongdoers are entitled to assume that their sins may be forgotten.").

However, statutes of limitations do have constitutional constraints. First, to comply with due process of law, the states must enact statutes of limitations which are reasonable and certain. Logan, 455 U.S. at 437; Wilson, 471 U.S. at 261. This Court has held that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson, 471 U.S. at 266 (citing Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). This Court explained that without certainty "[d]efendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." Wilson, 471 U.S. at 271, n.34.

Second, states, through their courts, may not find exceptions to the statutes of limitations that have not been enacted by the legislature. Even though the results of an individual case under the applicable statute of limitations may be harsh, the courts may not make an exception to the law. Scaife Co. v. Comm'r. of Internal Revenue, 314 U.S. 459, 463. It has been the rule since 1817 that where the legislature has made no exception, the courts can make none. M'Iver v. Ragan, 15 U.S. 25, 29, 30 (1817); The President and Dirs. of the Bank of the State of Alabama v. Dalton, 50 U.S. 522 (1850).

Finally, once a state has established a statute of limitations, it may not revoke it without notice. Texaco, Inc. v. Short v. Walden, 454 U.S. 516, 534 (1982). It has long been established that the right to assert statutes of limitations as a complete defense becomes a vested right within the

protection of the constitutional guaranty of due process of law. 51 Am. Jur. 2d Limitation of Actions § 4 (1970); Bd. of Educ. of Normal School Dist. v. Blodgett, 40 N.E. 1025, 1026 (Ill. 1895). Because "due process of law" and "law of the land" are one in the same, due process requires that laws that are in effect must be enforced. Id. at 1026. See also Walter Butler Bldg Co. v. Soto, 97 S.E.2d 275, 287 (W. Va. 1957). And the courts must enforce the law in a manner consistent with the intent and the word of the legislature. In the words of even the Supreme Court of Appeals of West Virginia:

> It is the duty of the courts to give a statute the interpretation called for by its language when this can reasonably be done . . . . It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten, or given a construction of which its words are not susceptible, or which is repugnant to its terms which may not be disregarded.

State v. General Daniel Morgan Post No., 548, V.F.W., 107 S.E.2d 353 (W. Va. 1959). See also State v. C.H. Musselman Co., 59 S.E.2d 472, 477-78 (W. Va. 1950).

The bottom line is that due process of law requires that parties must be provided "an opportunity . . . granted at a meaningful time and in a meaningful way for a hearing appropriate to the nature of the case." Logan, 455 U.S. at 437 (citations omitted). When these basic requirements are respected, "[t]he State's limited involvement in the running of the time period generally falls short of constituting the type of

state action required to implicate the protections of the Due Process Clause." Tulsa Prof'l. Collection Servs., Inc., 485 U.S. at 486. However, the State of West Virginia became involved in significant state action when it chose to ignore the statute of limitations in its order below.

The State of West Virginia has complied with the requirements of enacting a reasonable and certain statute of limitations. West Virginia Code § 55-2-12 states that "[e]very personal action for which no limitations otherwise prescribed shall be brought . . . [w]ithin two years next after the right to bring the same shall have accrued, if it be for damage to property." The Supreme Court of Appeals of West Virginia has given "accrued" appropriate construction. A cause of action accrues when the injury occurs, unless the statute is tolled until the claimant knows or by reasonable diligence should know of the claim. App. B at 5a (citing Syllabus Point 2, Gaither v. City Hosp. Inc., 487 S.E.2d 901 (W. Va. 1997)). However, mere ignorance of the existence is not reason to toll the statute; discovery applies only when the claimant has made a strong showing that the defendant has prevented claimant from learning of the injury. Id. (citing Syllabus Point 3, Cart v. Marcum, 423 S.E.2d 644 (W. Va. 1992)). If the cause of action is based on fraud, when the claimant knows or by reasonable diligence should know is a question for the jury. Id. (citing Syllabus Point 3, Stemple v. Dobson, 400 S.E.2d 561 (W. Va. 1990)).

Until the Supreme Court of Appeals of West Virginia issued its order below, the statute and the court's interpretation of the statute were also certain and reasonable. The parties agreed to the two-year statute of limitations; the Circuit Court of Raleigh County applied the same discovery rules cited in the opinion of the Supreme Court of Appeals of West Virginia. While the circuit court found that Respondent

had presented no evidence sufficient to raise the issue of discovery, the Supreme Court of Appeals of West Virginia remanded this case to permit the Respondent to retry her case and contrive evidence of fraud against the Petitioner where no evidence existed before.

In issuing its order below the Supreme Court of Appeals of West Virginia has attempted to make an exception to the statute established by the West Virginia Legislature. In doing so, the State has attempted to destroy the concept of statutes of limitations and deprive Petitioner, a citizen of another state, of due process of law by denying him his right to defend his property at a hearing held at a meaningful time and in a meaningful way. The people who had first hand knowledge of the events giving rise to the cause of action have passed away: Robert Wooton, the maker of the Note, died twenty-five years prior to the filing of the complaint and Chester Roberts, the holder of the Note, died fourteen years before the filing of the complaint. App. B at 8a, 9a. Respondent had reason to investigate the title of the assets of her husband's estate upon his death and certainly upon contact by Chester Roberts, notifying her of Robert Wooton's default on the Note. Id. at 8a. Instead, she chose to neglect any right the estate may have had to the Shares. After Chester Roberts' death and fourteen years after Chester Roberts first contacted Respondent, Petitioner was left to reconstruct the events of which he had no direct knowledge. Although he was not in possession of all the facts, Petitioner wrote a letter to Bill Wooton, the son of Respondent who is a West Virginia State Senator and Chairman of the West Virginia Senate Finance Committee, in an attempt to resolve the issues surrounding the Shares. App. E at 27a. This letter clearly stated that Chester Roberts claimed possession of the Shares. Id. Bill Wooton shared this information with his brother, James Wooton, who acted as agent for the Respondent. App. C at 22a. Again, the

Respondent neglected any right the estate may have had to the Shares. Then in 1986, Bill Wooton executed a Shareholders' Agreement, which on the front page listed all the shareholders of Legacy One. App. D at 24a-25a. The name of Robert Wooton or the Estate of Robert Wooton is clearly not contained in this list. Id. Twenty-two years after Chester Roberts claimed ownership of the Shares and nine years after Petitioner again asserted his father's claim to the Shares, Respondent decided to file a cause of action.

West Virginia has well-established rules for the tolling of statutes of limitations: the plaintiff in a case must produce evidence of a "strong showing that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." The circuit court found that, not only did she not make a "strong showing," Respondent produced no evidence to invoke the discovery rules. App. C at 23a. Conversely, Petitioner produced overwhelming evidence that the Respondent knew or should have known that Chester Roberts claimed ownership of the Shares. Petitioner directly told the Respondent through her agent that his father acquired the Shares in 1985. App. E at 27a. Even though the point in time from which the statute of limitations begins to run is a question for the jury in causes of action based on tort or fraud, Respondent must produce evidence sufficient to give the question to the jury. Again, the circuit court clearly found that the Respondent did not produce even a scintilla of evidence to invoke the discovery rules. App. C at 23a. Now, the Supreme Court of Appeals has ordered this case to be remanded, giving Respondent the opportunity to retry the case and to attempt to produce such sufficient evidence. App. A at 1a-3a. This state action is in violation of Petitioner's right to due process of law.

CONCLUSION

Because at least twenty-two years passed between the cause of action arising and the complaint being filed and the Respondent presented no evidence that either Petitioner or Legacy One prevented Respondent from knowing or learning that the Shares had been transferred, the Supreme Court of Appeals of West Virginia has issued an order in contravention to the mandates of the West Virginia State Legislature. It has created an exception to the rule where none was provided by the State Legislature. In doing so, the State has required the citizen of another state to defend a claim so stale that witnesses have indeed died, memories have certainly faded and evidence has surely been lost. By neglecting her claim for twenty-two years, Respondent has waived her right to litigate. Instead of refusing this cause of action, the State has resurrected it, permitting the Respondent to retry a case and present evidence where none existed before. For these reasons heretofore stated, the State of West Virginia has deprived Petitioner of due process of law under the Fourteenth Amendment of the United States Constitution; therefore, this Petition for Writ of Certiorari should be granted.

/s/_____
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APPENDIX A

[Court of Appeals Order - 8/9/99]
No. 25834

STATE OF WEST VIRGINIA
IN THE SUPREME COURT OF APPEALS
IN VACATION

BEULAH B. WOOTON, ADMINISTRATRIX OF THE ESTATE OF ROBERT O. WOOTON,
Plaintiff Below, Appellant

v.

DARRYL J. ROBERTS AND LEGACY ONE, INC. (FKA ASSOCIATED CEMETERY ESTATES, INC.),
Defendants Below, Appellees

The Court having maturely considered the record and the oral argument and briefs of counsel thereon, is of opinion for reasons stated in writing and filed with the record that there is error in the ruling of the Circuit Court of Raleigh County, rendered on 17th day of April, 1998. It is therefore considered and ordered by the Court that said ruling be, and it hereby is, set aside, reversed and annulled, and that the appellant, Beulah B. Wooton, Administratrix of the Estate of

Robert O. Wooton, do recover of and from the appellees, Darryl J. Roberts and Legacy One, Inc., (f/k/a Associated Cemetery Estates, Inc.), her costs about the prosecution of her appeal in this Court in her behalf expended. AND this action is remanded to the Circuit Court of Raleigh County for a trial wherein the jury should resolve the issue of whether the appellant's claims are barred by the statute of limitations as well as the appellant's allegations of breach of fiduciary duty, constructive fraud and unjust enrichment, all in accordance with the principles stated and directions given in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Raleigh County.

The syllabus of points adjudicated, prefixed to the written opinion aforesaid, prepared Per Curiam, was concurred in by Chief Justice Starcher and Justices Workman, Davis, Maynard and McGraw.

DONE IN VACATION of the Supreme Court of Appeals, this 9th day of August 1999.

Honorable Larry v. Starcher, Chief Justice

Honorable Margaret L. Workman

Honorable Robin Jean Davis

Honorable Elliot E. Maynard

Honorable Warren R. McGraw

Received the foregoing order this 9th day of August, 1999, and entered the same in Order Book No. 132.

A True Copy

Attest: /s/ Deborah L. McHenry
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

[Filed July 9, 1999]

Case No. 25834

BEULAH B. WOOTON, ADMINISTRATRIX OF THE ESTATE OF ROBERT O. WOOTON,
Plaintiff, Appellant

v.

DARRYL J. ROBERTS AND LEGACY ONE, INC. (FKA ASSOCIATED CEMETERY ESTATES, INC.),
Defendants, Appellees

Appeal from the Circuit Court of Raleigh County
Honorable Robert A. Burnside, Jr., Judge
Civil Action No. 94-C-777-B

REVERSED AND REMANDED
Submitted: June 8, 1999

SYLLABUS BY THE COURT

1. "'Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of the claim.' Syllabus Point 1, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 2, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

2. "'The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application.' Syllabus Point 2, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 3, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997).

3. "Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the 'discovery rule' applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." Syllabus Point 3, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992).

4. "Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury." Syllabus Point 3, *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990).

5. "'"'Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syllabus, *Nichols v. Raleigh-Wyoming Coal Co.*, 112 W.Va. 85[, 163 S.E. 767 (1932).'" Point 1, Syllabus, *Jenkins v. Chatterton*, 143 W.Va. 250[, 100 S.E.2d 808] (1957).' Syl. Pt. 1, *Jividen v. Legg*, 161 W.Va. 769, 245 S.E.2d 835 (1978)." Syllabus Point 2, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

6. "The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syllabus Point 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Raleigh County entered on April 17, 1998. In that order, the circuit court directed verdicts in favor of the appellees and defendants below, Darryl J. Roberts and Legacy One, Inc., in an action filed by the plaintiff, Beulah Wooton, administratrix of the Estate of Robert Wooton, alleging breach of fiduciary duty and

constructive fraud with regard to corporate stock owned by her deceased husband. The circuit court found that the action, which was filed more than twenty years after the stock was allegedly transferred from the decedent's estate, was barred by the statute of limitations. In this appeal, the plaintiff contends that the circuit court erred by directing verdicts in favor of the appellees because she was entitled to the benefit of the "discovery rule."

This Court has before it the petition for appeal, the entire record, and briefs and argument of counsel. For the reasons set forth below, the final order of the circuit court is reversed and this case is remanded for further proceedings.

I.

Robert O. Wooton began working for Associated Cemetery Estates, Inc. (hereinafter "ACE" or "Legacy One"[1] in 1956. At that time, ACE, a cemetery and funeral home business, was owned by Chester and Marzetta Roberts. In 1959, ACE offered seven of its "key" employees the opportunity to purchase 400 shares of ACE stock. Robert Wooton was one of the employees to whom stock ownership was offered.

On January 4, 1960, stock was transferred to the ACE employees by a Stock Agreement. Pursuant to the agreement, each employee signed a promissory note to pay for his or her shares of stock. According to the plaintiff, she and her

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[1] Legacy One is the successor corporation to ACE.

husband understood that the stock would be paid for by future dividends and directors' fees.

The promissory note signed by Robert Wooton stated that he "promise[d] to pay to the order of Chester G. Roberts . . . Eight Thousand Dollars ($8,000.00) in Ten (10) equal installments." The obligation bore an annual interest rate of 4% and the share certificates were deposited as collateral security for the payment of the note. Thus, neither Robert Wooton nor any of the other ACE employees had physical possession of the stock certificates.

On March 8, 1969, Robert Wooton died. More than two years later, the plaintiff received a letter dated October 8, 1971, from Chester Roberts informing her that her husband had been in default under the terms of the promissory note at the time of his death because he had failed to make the scheduled principle and interest payments. The letter further stated that "[i]n accordance with our conversation of October 7, 1971,[2] I am enclosing a check in the amount of $4,000.00 to purchase Bob's estate equity in Certificates No. 7 and 18." After receiving this letter, the plaintiff informed Chester Roberts that his offer was inadequate. She neither cashed, nor returned the check.

On March 24, 1972, Chester Roberts sent a letter to ACE's secretary, Mary Frances Roop, informing her that he had purchased Robert Wooton's stock at a private sale. He requested that she issue a new stock certificate to him in the amount of 400 shares. The next day, Mary Roop issued a

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[2] The plaintiff has no recollection of any such conversation.

new certificate for 400 shares of ACE stock to Chester Roberts and canceled the certificates issued to Robert Wooton. Thereafter, Chester Roberts gave the stock he repurchased from Robert Wooton to his son, Darryl Roberts, as a Christmas present in 1976.

Chester Roberts died in 1980, and Darryl Roberts became the president and chief executive officer of ACE. In January 1985, Darryl Roberts approached Bill Wooton, one of Robert Wooton's sons, to discuss the status of his father's stock. At that time, Darryl Roberts stated that Robert Wooton had failed to make the required principal and interest payments on the note. He renewed his father's previous offer to buy the stock for $4000.00 plus an additional 5% interest per year since the initial offer was made.

Bill Wooton forwarded this information to his brother, James Wooton, who was living in Baltimore, Maryland, with a letter stating, "I believe they discontinued dividends at his death, even though daddy or his estate still owned the stock." James Wooton responded to Darryl Robert's offer with a counterproposal on February 7, 1985. Darryl Roberts rejected the counteroffer and simply reinstated his previous offer.

On June 3, 1986, Bill Wooton, who had acquired 9.25 shares of Legacy One stock in exchange for legal services previously rendered to an affiliate of ACE,[3] executed a Legacy One Shareholders Agreement.[4] The agreement listed

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[3] Bill Wooton is an attorney.

[4] In 1986, the assets and liabilities of ACE and a number of affiliates were transferred to Legacy One and the shareholders of

the names of all Legacy One shareholders as of May 28, 1986. Bill Wooton's name appeared on the document as owning 9.25 shares. However, neither Robert Wooton nor his estate's name appeared on the list as a shareholder. Bill Wooton later claimed that he executed the agreement without reading the document and without knowledge that his father was not included as a shareholder.

In the 1990s, various offers to settle the matter were made between Legacy One and James Wooton. On July 18, 1994, Legacy One made a final offer to settle the matter for $12,000.00. That offer was rejected.

On November 9, 1994, the plaintiff was named as Administratrix of Robert Wooton's Estate. She filed a complaint against Darryl Roberts and Legacy One on November 28, 1994, claiming, *inter alia,* breach of fiduciary duty and constructive fraud relating to her husband's stock. During the course of litigation, several summary judgment motions were filed by the appellees asserting that the plaintiff's claims were barred by the statute of limitations. These motions were denied.

The case proceeded to trial before a jury on March 24-26, 1998. At the close of the plaintiff's presentation of evidence, the appellees moved for directed verdicts pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure. They claimed that the plaintiff knew or should have been on notice by at least February 1985, that her husband's stock had been transferred. They further asserted that if the plaintiff

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ACE and the affiliates were issued stock in Legacy One.

had made a reasonable inquiry, she would have learned that the stock had been repurchased by Chester Roberts. Thus, the appellees maintained that the plaintiff failed to show that she was entitled to the benefit of the discovery rule, and therefore, her claims were barred by the statute of limitations.

The trial court accepted the arguments of the appellees, finding that the plaintiff had sufficient information by 1972 to know that something had happened to cause her not to have the enjoyment of possession of the stock. In addition, the trial court found that by 1985, the plaintiff's sons had the same knowledge. The trial court further found that the plaintiff had not offered sufficient evidence to create an issue of fact as to whether either of the appellees did something to prevent her from knowing or finding out what happened to her husband's stock. Thus, the court concluded that the discovery rule was not applicable and that there were no other issues of fact. Accordingly, the motions for directed verdicts were granted in favor of both appellees on all counts based on the statute of limitations. A final order reflecting the trial court's ruling was entered on April 17, 1998. This appeal followed.

II.

The plaintiff contends that the circuit court erred by directing verdicts for the appellees based on the statute of limitations. She maintains that the discovery rule applies and that she did not have notice of the stock transfer until 1994. In support of her assertions, the plaintiff has presented letters showing that the appellees made offers to purchase her husband's stock through the early 1990s. She contends that

the appellees did not claim ownership of the stock until 1994.

The parties basically agree that a two-year statute of limitations applies in this case.[5] "'Generally, a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.' Syllabus Point 1, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 2, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). "'The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application.' Syllabus Point 2, *Cart v. Marcum,* 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 3, *Gaitherv. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). However, we have recognized that there are some instances where the discovery rule should not be applied because the nature of the injury or wrong is such that a plaintiff could not reasonably claim ignorance of the existence of a cause of action. In that regard, we have held that:

Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.

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[5] Darryl Roberts concedes that a five year statute of limitations may apply to the plaintiff's claim of unjust enrichment and request for specific performance.

Syllabus Point 3, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992).

Relying upon our holding in Syllabus Point 3 of *Cart*, *supra*, the appellees assert that the plaintiff knew or should have been on notice by at least February 1985 that her husband's stock had been transferred. They assert that a reasonable inquiry by the plaintiff would have revealed this fact. Moreover, they contend that the plaintiff has failed to show that any actions on their part kept her from discovering that the stock had been transferred.

In Syllabus Point 3 of *Stemple v. Dobson*, 184 W.Va. 317, 400 S.E.2d 561 (1990), we held that:

> Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.

In *Stemple*, the plaintiffs brought an action for breach of contract and fraudulent concealment of termite damage against the former owners of their home. The circuit court granted summary judgment in favor of the defendants based on the statute of limitations. On appeal, this Court reversed the decision of the circuit court finding the issue of when the claim accrued for purposes of the statute of limitations was a question of fact for the jury.

In this case, the circuit court granted the appellees' motions pursuant to Rule 50(a) of the West Virginia Rules of Civil Procedure which provides:

(a) *Judgment as a matter of law.* -- (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

In Syllabus Points 2 and 3 of *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996), this Court held that:

"'"Upon a motion to direct a verdict for the defendant, every reasonable and legitimate inference fairly arising from the testimony, when considered in its entirety, must be indulged in favorably to plaintiff; and the court must assume as true those facts which the jury may properly find under the evidence. Syllabus, *Nichols v. Raleigh-Wyoming Coal Co.*, 112 W.Va. 85[, 163 S.E. 767 (1932)]."' Point 1, Syllabus, *Jenkins v. Chatterton*, 143 W.Va. 250[, 100 S.E.2d 808](1957)." Syl. Pt. 1, *Jividen v. Legg*, 161 W.Va. 769, 245 S.E.2d 835 (1978).

The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of

a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed.

Thus, in the case *sub judice,* we must determine whether the evidence presented by the plaintiff was sufficient to create a question of fact for the jury as to whether she was entitled to the benefit of the discovery rule. In other words, did the plaintiff offer evidence from which a reasonable jury could conclude that she did not know or had no reason to know that her husband's stock had been transferred prior to 1994.

After reviewing the record, we conclude that the plaintiff did offer sufficient evidence during the presentation of her case to create a question of fact for the jury regarding whether her claim was barred by the statute of limitations. We disagree with the circuit court's conclusion that because the plaintiff did not receive dividends after her husband's death, she had reason to know that something had happened to the stock. The plaintiff presented evidence indicating that she believed the stock was being paid for with the dividends and did not expect to collect them. More importantly, the plaintiff presented evidence that she received offers from the appellees to purchase her husband's stock through the 1990s. The plaintiff maintains that those offers gave her reason to believe that she still owned the stock. She contends that once the appellees claimed ownership of the stock in 1994, she timely filed suit. Considering these facts in the light most favorable to the plaintiff, we believe that the jury should have been given the opportunity to consider this evidence and

determine whether the plaintiff's claims are barred by the statute of limitations.

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Raleigh County is reversed and this case is remanded to the circuit court for trial. The jury should resolve the issue of whether the plaintiff's claims are barred by the statute of limitations as well as the plaintiff's allegations of breach of fiduciary duty, constructive fraud, and unjust enrichment.

Reversed and remanded.

APPENDIX C

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

NO. 94-C-777-B

BEULAH B. WOOTON,
Administratrix of the Estate of
ROBERT O. WOOTON,
Plaintiff,

vs.

DARRYL J. ROBERTS and
LEGACY ONE, INC., (f/k/a
ASSOCIATED CEMETERY
ESTATES, INC.,
Defendant.

VOLUME III

Transcript of the trial of the above-styled Civil Action on Thursday, March 26, 1998, commencing at 9:04 a.m., at the Raleigh County Courthouse, Beckley, West Virginia, before The Honorable Robert A. Burnside, Jr., Judge, and a jury.

APPEARANCES:

Plaintiff Beulah B. Wooton, in person and by counsel:

DEBRA L. HAMILTON, ESQUIRE, and
JOSHUA I. BARRETT, ESQUIRE,
DiTrapano & Jackson
604 Virginia Street
Charleston, West Virginia 25301

Defendant Darryl J. Roberts, in person and by counsel:

DAVID A. BARNETTE, ESQUIRE,
Jackson & Kelly PLLC
Post Office Box 553
Charleston, West Virginia 25322-0553

Defendant Legacy One, Inc., by counsel:

JOHN J. NESIUS, ESQUIRE,
Spilman, Thomas & Battle
Post Office Box 273
Charleston, West Virginia 25321-0273

Carol G. Ackison
Official Court Reporter

Circuit Court Transcript of Trial - 3/26/98

[Order Directing Verdict in Favor of Defendants]

Trial Transcript at pp. 217-222.

THE COURT: . . . . Now, the entire genesis of this cause of action is grounded in events – in that event of March 25, 1972, when the transfer of the shares of Mr. Wooton's stock was directed by Chester Roberts to be made by the corporate secretary to him. That is the moment which Mr. Wooton's estate was divested of – if at all, if they were divested, that's when it happened.

There was correspondence of 1971 and a check that predated that event in 1972, but that is not terribly significant because it served only to put Mrs. Wooton on notice that Mr. Wooton had been in default. Knowledge of a default is not equivalent to knowledge of what amounted to a foreclosure or a transfer that happened later in 1972. So 1972, March 25th, is the critical date, and that is when the cause of action arose. Under the facts presented, that cause of action would have to be based on the premise that the transfer was wrongful because there had been no default or void because there had been no default, or if the transfer was correct, there would be a cause of action in some form for an accounting for the excess of the value of the shares over the amount remaining on the debt. And there existed at that time, I believe, valid issues over those things, over whether there had been a default, and if so, what type of accounting would be necessary. There is some uncertainty as to, even using the contract, as to how you would make that calculation. So there were valid issues existing then about that.

Mr. Roberts, Chester Roberts, from this evidence in this case obviously was a prudent businessman, he ran his company well. He, as they say now, he grew it well. How "grew" turned into a transitive verb, it did; but, anyway, he made it develop and he was a good manager, but, unfortunately, it looks to me like this thing wasn't done well, and some issues remain over whether there was a default and how much, if anything, was due, if there had been a default and the transfer was correct.

Now, the critical point here, though, is whether Mrs. Wooton, as a representative of the Wooton estate, was on notice that the transfer had occurred, and I think that the evidence in this case has to be yes, but there is no issue about that. From 1972 forward, she did not enjoy any of the benefits associated with possession of this stock. There is no dispute that she never received notice of a shareholder's meeting, she never received any dividend checks, either written to her or to her husband's estate. Nothing. She had nothing that would indicate ownership or possession, none of the elements or actions or things that go with that.

Now the question has been raised as to the impact of not receiving dividends and the arguments made that really that shouldn't mean much because she thought that dividends were somehow just applied to the note and reduced the note, and so she'd never see a dividend. That clearly – if she thought that, that was a mistake as to the clear terms of the contract. The contract doesn't say so. The parol evidence rule would prevent her from raising that claim even then or now, had she raised it in 1972 or 1973. That mistake by her, assuming she made the mistake, and I'll resolve that issue of fact for the Plaintiff, she really, honestly thought that, that

does not create an issue of fact, though, as to whether or not the absence of dividends meant something to her, put her on notice of something. Defendants cited to some case law, the effect of which is to say that the lack of action or lack of interest or maybe even a misunderstanding of why she had does not, standing alone, create a discovery issue.

There is no doubt at all that, in 1972, Mrs. Wooton was busy, overwhelmed perhaps, with the duties she had as a what we now call a single mother. I guess we had a different term for her situation then, but it was a severe situation, but, unfortunately, the law doesn't say that being busy or being overwhelmed or being diverted from attending to the business at hand excuses or invokes the discovery rule. I don't think there is an issue of fact, then, that by the failure to receive dividends or notices or the other indicia of ownership of corporate stock that she was on notice that something had happened, something had happened, and that something, whatever that was, ended those elements or indicia of ownership. Yet nothing was done.

From 1972 to 1995, apparently no attention, or insufficient attention was given to it and in 1985 – I'm sorry, 1972 to 1985 insufficient attention was given to it. Mr. Wooton, William Wooton, then raised the issue with Darryl Roberts. During those 13 years, Chester Roberts had died and Darryl was now in his place and Darryl Roberts had to figure it out by looking into the records. The evidence indicates that. What Darryl had to figure out is neither here not there for the purposes of whether there is an issue of fact. There is no issue of fact on the point that Mrs. Wooton had sufficient information in 1972 to know that something had happened. Something had happened to cause her not to have

the enjoyment of possession of this stock. Thirteen years later, serious inquiries began to be made, but that was 13 years later.

Now, accepting Plaintiff's evidence on this point, that the only agent acting for Mrs. Wooton or the family or the estate was Jim Wooton, in Baltimore, I have to accept that for purposes of directed verdict. Jim Wooton knew the same things that Mrs. Wooton knew. He knew there had been no dividends paid in those years, no shareholder notices. He also had the benefit of this letter which says something about repurchase. Now that's a term we don't know what it means. It's a term that could mean a couple of things, but it indicates that Mr. Roberts had done something that affected these shares. That is a notice, that's knowledge that is counter to the application of the discovery rule.

Jim Wooton knew enough, he had enough information then to know that either Chester Roberts or the corporation had done something. You don't have to know every element of your cause of action or know that you have enough to win in order to be charged with the running of the statute of limitations. The discovery rule runs the other direction. If fraud had occurred, if a squeeze out had occurred, a conversion or a theft or whatever, it happened in 1972. Gaither v. City Hospital, 199 W.Va. 706, a 1997 case, there is nothing new about it, but it carries forward it a lot of existing precedent: The discovery rule applies to all tort actions or all actions like this. In 712, mere ignorance of the existence of a cause of action or the identity of the wrongdoer does not prevent running of the statute of limitations. The discovery rule applies only when there is a strong showing by the Plaintiff that some action by the Defendant, some action

by the Defendant, prevented her from knowing of the wrong at the time of the injury. In Statler v. Bailey, 184 W.Va. 212, mere silence by the wrongdoer is not enough unless he has done something to prevent the Plaintiff from discovering the wrong.

The Plaintiff has not offered sufficient evidence to create an issue of fact as to whether the Defendant or Chester Roberts, I'm sorry, the Defendant acting in someway as a successor to Chester Roberts, or the Defendant himself, or the Defendant corporation, did something to prevent her from knowing or finding out or preventing her son, Jim Wooton, from finding out what had happened to her husband's stock in 1972.

In the absence of an issue of fact that would permit the application of the discovery rule, no other issues remain, and so I am compelled under the state of the evidence to grant the directed verdict for both Defendants on all counts.

That concludes my announcement of the ruling on the motions for directed verdict. Plaintiff certainly will have your exceptions preserved to the extent that is necessary for you to take the matter up. I will now bring out the jury and instruct them that the matter has been resolved.

APPENDIX D

[Dated May 28, 1996]

AGREEMENT

AGREEMENT, dated this 28th day of May, 1986, by and between LEGACY ONE, INC., a corporation organized and existing under the laws of the State of West Virginia hereinafter referred to as "Corporation" and Estate of Chester Roberts, Marzetta Roberts, Darryl Roberts, Shelby Roberts, Mary Frances Roop, Paul W. Roop, Boyd E. Terry, David A. Whitener, Joe R. Smith, Ann Roberts, Adam Roberts, James A. Safewright, James F. Safewright, Robert A. Goss, Estate of Leah Tony Trail, Donal Meadows, Bill Wooten, Roger Pauley, individual Shareholders, hereinafter referred to as "Shareholders".

W I T N E S S E T H:

WHEREAS, the "Shareholders" are the owners of all the capital stock of the Corporation and hold the stock as follows:

Estate of Chester Roberts	8,778.43 shares
Marzetta Roberts	3,141.74 shares
Darryl Roberts	2,541.52 shares
Shelby Roberts	78.40 shares
Mary Frances Roop	549.81 shares
Paul W. Roop	305.29 shares
Boyd E. Terry	211.63 shares
David A. Whitener	196.80 shares

Joe R. Smith	185.69 shares
Ann Roberts	18.50 shares
Adam Roberts	18.50 shares
James A. Safewright	2.97 shares
James F. Safewright	15.76 shares
Robert A. Goss	15.76 shares
Estate of Leah Tony Trail	3.93 shares
Donal Meadows	15.76 shares
Bill Wooten	9.25 shares
Roger Pauley	100.00 shares
Treasury	194.95 shares
TOTAL SHARES:	16,384.69

WHEREAS, the Corporation and the Shareholders are agreed that the success of the Corporation requires an active interest, support and attention of its shareholders and that for this reason it is advisable to prevent its shares to go upon the open market for sale; and

WHEREAS, all the parties hereto are opposed to the introduction into the ownership of the Corporation of strangers not willing and able to contribute in like manner to the success of the Corporation and desire to restrict the privilege of owning shares in the Corporation.

. . . .

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

. . . .

/s/ William R. Wooton

Bill Wooten, stockholder

STATE OF WEST VIRGINIA

COUNTY OF RALEIGH, TO-WIT:

I, Cindy L. Cook, a Notary Public in and for said county and state, do hereby certify that William R. Wooton, whose name is signed to the foregoing writing bearing date the 28th day of May, 1986, has this day acknowledged the same before me in my said county.

Given under my hand this 3rd day of June, 1986.

My commission expires:

/s/ Cindy L. Crook
Notary Public
Commissioned as Cindy L. Linville

APPENDIX E

[Dated January 21, 1985]

ASSOCIATED CEMETERY ESTATES, INC.
300 NORTH KANAWHA STREET
P. O. BOX 1586 - PHONE 304-255-0505
BECKLEY, WEST VIRGINIA 25801

January 21, 1985

Mr. William R. Wooton
WOOTON, WOOTON & FRAGILE
P. O. Box 1733
Beckley, WV 25801

Dear Bill:

I have attempted to research the rationalism behind the repurchase of your father's stock in 1969. From what I have learned, various people wanted to purchase shares of A.C.E. stock. Those shares were to be purchased out of dividends from the corporation and they were secured by a note to Chester Roberts. In your father's instance, at the time of his death, he had not made the principal and interest payments as scheduled. After his death, a calculation was made to

determine the value of the stock. They subtracted the amount owed on the note from that value and wrote your mother a check for $4,000, which, as you well know, was never cashed.

It seems that the most reasonable position to take at this time is that we will pay your mother the $4,000 as we agreed to do in 1969, and on top of that, we will pay her an average interest rate of 5% per year for the fifteen years since that time. This amounts to $8,315.71. If this is satisfactory with you and your mother, please let me know and we will issue the check within thirty (30) days.

Yours truly,

ASSOCIATED CEMETERY ESTATES, INC.

_____

/s/ Darryl J. Roberts
President

DJR:nkg

Supreme Court, U.S.
FILED
DEC 7 1999
CLERK

No. 99-794

IN THE
SUPREME COURT OF THE UNITED STATES

DARRYL J. ROBERTS,
Petitioner,

v.

BEULAH B. WOOTON, ADMINISTRATRIX
OF THE ESTATE OF ROBERT O. WOOTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION

JOSHUA I. BARRETT, ESQ. *
DITRAPANO, BARRETT & DIPIERO, PLLC
604 VIRGINIA STREET EAST
CHARLESTON, WEST VIRGINIA 25301
(304) 342-0133

Counsel for Respondent

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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ABSENCE OF JURISDICTION IN THIS COURT

This Court lacks jurisdiction to grant the Writ. The decision of the West Virginia Supreme Court of Appeals which is the subject of the Petition is a non-final order remanding a case for factual development on an issue of state law. Jurisdiction is improperly asserted, therefore, under 28 U.S.C.§ 1257 and Rule 14(i) of the Rules of this Court. Sup.Ct.R.14(i); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 502-05 (1975). Petitioner never raised any federal Constitutional Claim in the West Virginia Supreme Court of Appeals, and its ruling was not a final one. Furthermore, there is no substantial federal question presented.

STATEMENT OF THE CASE

In this civil action, Respondent asserts that stock belonging to her husband rightfully belongs to her. After Respondent's husband's death, his stock was wrongfully converted by Chester Roberts and Associated Cemetery Estates, subsequently transferred to the Petitioner Darryl Roberts, transformed into other assets upon the sale of the corporation, and then finally transferred by Petitioner to two trusts, the Darryl Roberts Trust and the Ann Roberts Trust (both of which are subject to Petitioner's control) into which the assets can now be traced. The Opinion below reviewed a decision by a trial court, the Circuit Court of Raleigh County, West Virginia, directing judgment as a matter of law against the Respondent on the ground that the statute of limitations had run on her claims. The West Virginia Supreme Court of Appeals, in a *per curiam* opinion, found that under the facts presented, plaintiff was entitled to a jury determination of when the statute of limitations accrued. The Court's rationale focused on the "discovery rule", a rule of state law discussed below:

[I]n the case *sub judice,* we must determine whether the evidence presented by the plaintiff was sufficient to create a question of fact for the jury as to whether she was entitled to the benefit of the discovery rule. In other words, did the plaintiff offer evidence from which a reasonable jury could conclude that she did not know or had no reason to know that her husband's stock had been transferred prior to 1994.

After reviewing the record, we conclude that the plaintiff did offer sufficient evidence during the presentation of her case to create a question of fact for the jury regarding whether her claim was barred by the statute of limitations. We disagree with the circuit court's conclusion that because the plaintiff did not receive dividends after her husband's death, she had reason to know that something had happened to the stock. The plaintiff presented evidence indicating that she believed the stock was being paid for with the dividends and did not expect to collect them. More importantly, the plaintiff presented evidence that she received offers from the appellees to purchase her husband's stock through the 1990s. The plaintiff maintains that those offers gave her reason to believe that she still owned the stock. She contends that once the appellees claimed ownership of the stock in 1994, she timely filed suit. Considering these facts in the light most favorable to the plaintiff, we believe that the jury should have been given the opportunity to consider this evidence and

> determine whether the plaintiff's claims are barred by the statute of limitations. Pet. App. B at 15a-16a.

At no point in the appeal did the Petitioner assert that his rights under the Due Process Clause were at issue. Indeed, the Petition makes no mention of when the federal questions sought to be reviewed were raised, the manner of raising them and the way they were passed on in the courts below as required by Rule 14(i) of the Rules of the United States Supreme Court.

REASONS FOR DENYING THE WRIT

The obvious fatal flaw in the Petition is that it fails to support jurisdiction under 28 U.S.C.§ 1257 because the decision appealed from is not a "final judgment or decree". As this Court stated in Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997).

> From the earliest days of our judiciary, Congress has vested in this Court authority to review federal question decisions made by state courts. For just as long, Congress has limited that power to cases in which the State's judgment is final. See Judiciary Act of 1789, § 25, 1 Stat. 85. The current statute regulating our jurisdiction to review state-court decisions provides:
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United

> States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."28 U.S.C. § 1257(a).
>
> This provision establishes a firm final judgment rule. To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." Market Street R. Co. v. Railroad Comm'n of Cal., 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). As we have recognized, the finality rule "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124, 65 S.Ct. 1475, 1478, 89 L.Ed. 569 (1945).

Jefferson, 522 U.S. at 80-81.

The order from the West Virginia Supreme Court of Appeals remanding the case for a new trial is not a "final judgment". See Wright, Miller and Cooper, Federal Practice

and Procedure: Jurisdiction 2d. § 4009, p. 159. Because Petitioner will be free to assert, and may prevail on his statute of limitations defense on remand to the Circuit Court of Raleigh County, he cannot present a justiciable issue to this Court.

A second fatal flaw in the Petition is that the supposed federal constitutional issue was not presented to the West Virginia Supreme Court of Appeals. Not only was no such question presented in Petitioner's "Response of Darryl Roberts to Brief of Appellant"; Petitioner failed to cite a single case from the federal system. See Resp. App. 1

Finally, the due process claim asserted is patently meritless. Petitioner claims that the West Virginia Supreme Court of Appeals violated due process by creating a new exception to a legislatively created statute of limitations. This is untrue. The statute of limitations relied upon does not address when the cause of action accrues. See W. Va. Code § 55-1-12. It is therefore proper for the court and jury to apply a well established, judicially created rule of state law that controls this issue: "Generally a cause of action accrues (i.e., the statute of limitations begins to run) when a tort occurs; under the 'discovery rule,' the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of the claim.' Syllabus Point 1,." Syllabus Point 1, Cart v. Marcum, 188 W.Va. 241, 423 S.E.2d 644 (1992)." Syllabus Point 2, Gaither v. City Hosp., Inc., 487 S.E.2d 901 (W. Va. 1997). The statute of limitations established by the state legislature contravenes neither this language nor its application in this case.

The Petitioner apparently urges that he was deprived of due process because there was no evidence that Respondent was prevented from discovering her claim. Although this

argument would not rise to a federal claim in any event, Petitioner has misstated both the state law and the facts. In its opinion in the instant matter, the Supreme Court of Appeals noted that "there are some instances where the discovery rule should not be applied because the nature of the wrong is such that a plaintiff could not reasonably claim ignorance of the existence of the cause of action", Pet. App. B at 12a, and that in those instances the plaintiff must make a strong showing that the defendant did something to prevent the plaintiff from knowing of the claim. Id.; accord Gaither v. City Hosp., Inc., 487 S.E.2d at 907. But the court did not hold Respondent's case to be one of those "instances" and accordingly did not decide the matter under this narrower formulation; rather, it held a jury should decide whether the general discovery rule saved Respondent's claim: i.e., whether Respondent knew or reasonably should have known of her claim at an earlier date. Contrary to the assertions in the Petition, Respondent had, in the courts below, presented facts to show why Respondent did not know that the stock had been taken from her husband and transferred to Petitioner and the West Virginia Supreme Court of Appeals so found. Pet. App. B at 15a.

Finally, Petitioner's due process rights have not been denied because he will have an opportunity to present his statute of limitations defense to the jury in any event. No more than this is required: that defendant have a meaningful opportunity to be heard before a deprivation of property takes place. See, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 420, 433-34 (1982).

CONCLUSION

This case is currently pending, upon issues of purely state law, in the courts of the State of West Virginia. Respondent respectfully submits that this Court has no

jurisdiction over such matters. Accordingly, the Petition for the Writ of Certiorari should be denied.

/s/_____
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APPENDIX 1

EXCERPT FROM THE RESPONSE
OF DARRYL J. ROBERTS TO
BRIEF OF APPELLANT
11/16/98

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SUPREME COURT, U.S.
FILED
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Case No. _____

IN THE UNITED STATES SUPREME COURT

October Term 1999

STATE OF FLORIDA, *Petitioner*,

v.

NATHAN JOE RAMIREZ, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA SUPREME COURT IN BELOW, CONFLICTS WITH THIS COURT'S DECISIONS IN OREGON V. ELSTAD, 470 U.S. 298 (1985), FARE V. MICHAEL C., 442 U.S. 707 (1979) AND COLORADO V. CONNELLY, 479 U.S. 157 (1986) BY HOLDING THAT THE VIDEOTAPED CONFESSION GIVEN BY 17 YEAR OLD RAMIREZ, AFTER A READING AND WAIVER OF HIS CONSTITUTIONAL RIGHTS AS SET FORTH IN MIRANDA V. ARIZONA, 384 U.S. 436 (1966), BUT AFTER HE HAD MADE PREVIOUSLY UNWARNED, AND UNCOERCED STATEMENTS, WAS OBTAINED IN VIOLATION OF MIRANDA?

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No. _____

IN THE UNITED STATES SUPREME COURT

October Term 1999

STATE OF FLORIDA,
Petitioner,

v.

NATHAN JOE RAMIREZ,
Respondent.

OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is reported as Ramirez v. State, 24 Fla. L. Weekly S353, (Fla. 1999).

Petitioner's Appendix contains the opinion of the Florida Supreme Court below, Case No. 89,377, (A-1 - A-52), as well as the court's order denying rearing. (A-53). The appendix further contains the Order of the Florida Supreme Court granting stay (A-54), and Excerpt from Transcript – Denial of Motion to Suppress (A-55). The parties will be referred to as they appear before this Court or as they stood in the court(s) below.[1]

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[1] The symbol "A" followed by the appropriate page number expresses a citation to the materials contained in the Appendix to this pleading.

JURISDICTION

The decision below was entered on July 8, 1999 (A-1 - A-52) and rehearing was denied on September 13, 1999 (A-53). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the following amendments to the United States Constitution are involved:

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fifth Amendment is applicable to the states through the Fourteenth Amendment of the United States Constitution which provides in pertinent part:

> Section 1. No State shall....deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the Florida Constitution provides in pertinent part:

> Due Process. - No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE

The material facts, as set forth by dissenting Florida Supreme Court Justice Wells, are as follows:

> I. Factual Background
>
> The majority omits all but a summary factual statement of this burglary, rape, kidnapping, and, finally, murder of Mildred Boroski, a septuagenarian widow. A detailed version of the criminal episode and the events leading to the interrogation is necessary to place the conduct of the detectives who interviewed Ramirez into context. This criminal episode took place between midnight and 7 a.m. on March 11, 1995. The two participants in the crime were John Grimshaw and Ramirez, both age seventeen at the time of the crime and the subsequent police interrogation. Grimshaw was the elder of the two.
>
> Ms. Boroski lived alone in a retirement village in Pasco County. Her late husband had been a police chief in the state of Ohio. Ms. Boroski had a .38 caliber service revolver and a pair of handcuffs; both had belonged to her husband. She kept both the revolver and the handcuffs in her bedroom. Grimshaw lived in a house across the street from Ms. Boroski. Ramirez lived with his father and stepmother in the same retirement village as Ms. Boroski.
>
> At around midnight on March 11, 1995, Grimshaw and Ramirez climbed over a fence into Ms. Boroski's backyard and cut the exterior phone lines. Next, they cut through a screen door and gained access to a porch. Ramirez then broke the glass out of a window with the use of a crowbar. Grimshaw and Ramirez, both wearing gloves, climbed into the house through this window.

Ramirez took a knife from one of the drawers in the kitchen. When the two went into the room where Ms. Boroski was sleeping, her small dog started barking and came at Ramirez. Ramirez hit the dog with the crowbar he was carrying. The force of the blow killed the dog instantly, causing it to defecate all over the room. Ms. Boroski awoke. Grimshaw told her to shut up and then tied Ms. Boroski, who was lying on her stomach, to the bed with phone cords. Ramirez assisted in restraining Ms. Boroski.

Grimshaw took two rings Ms. Boroski was wearing. Ramirez took the gun and the handcuffs which were in Ms. Boroski's bedroom. Ramirez stated that Grimshaw then raped Ms. Boroski. The duo then placed Ms. Boroski in her car along with her dead dog. Ramirez, along with Grimshaw, drove that car to an open field. Once at the open field, they marched Ms. Boroski approximately 200 feet into the field, where she was told to lie down. Ramirez fired two shots into Ms. Boroski's head, killing her.

Grimshaw and Ramirez then drove Ms. Boroski's car into a wooded area and walked back to Grimshaw's house. Ramirez threw the keys to the car into a lake, and the keys were later found by a person fishing. Ramirez hid the gun used to murder Ms. Boroski under the mattress of his waterbed. Ramirez's stepmother discovered the gun as well as a second gun. Ramirez's father told him he did not want the guns in the house, so Ramirez temporarily gave the guns to a friend named Rodney. Rodney, who was on probation, reluctantly accepted the guns. Ramirez gave the handcuffs to his girlfriend. In addition to the rings, Grimshaw and Ramirez took a few dollars

and some change from Ms. Boroski's purse. The two spent the money on video games the next day.

Ms. Boroski's car was located on March 11, 1995. A deputy sheriff went to Ms. Boroski's home the next day and discovered signs of the forced entry. Upon entering the home, the deputy noticed that every telephone was either missing or disconnected. The bedroom had been ransacked. There was evidence of blood and fecal matter. A crime team was dispatched to the house. Grimshaw saw the crime team and approached one of the crime technicians, offering to help the investigators search for Ms. Boroski. Grimshaw led investigators on a search that lasted a couple of hours, but the body was not located.

Ms. Boroski's body was discovered on March 14, 1995. Ms. Boroski was lying on her back with a pillow under her head and another on top of her head. A pillow case was covering her head. She was barefoot and wearing a white nightgown. The nightgown was hiked up above her genital area, and her underwear was cut around the crotch area. Her wrists were bound with what was identified as two different types of telephone cord. Her anal and vaginal areas showed bruising consistent with a sexual assault.

Grimshaw soon thereafter became a suspect in the investigation. On May 3, 1995, Grimshaw was taken into custody and interviewed at the Sheriff's office for more than five hours. Grimshaw gave varying accounts of what transpired on the morning of March 11, 1995. He told a detective that Ramirez had some of Ms. Boroski's property. To verify this allegation, police had Grimshaw call Ramirez. The conversation was recorded by investigators.

In the recorded telephone conversation, Ramirez acknowledged possessing some of Ms. Boroski's property:

> [Grimshaw:] You didn't happen to get that gun back from Ronnie, did you?
>
> [Ramirez:] Not yet.
>
> . . . .
>
> [Grimshaw:] . . . Did you ever give that ring to Christy [Ramirez's girlfriend] yet?
>
> [Ramirez:] No. It won't fit her.
>
> . . . .
>
> [Ramirez:] . . . I don't know where the single-stone ring is. I lost that one. The one with the three stones in it, I have that. . . .
>
> . . . .
>
> [Grimshaw:] The handcuffs[?]
>
> [Ramirez:] Christy got those.

Following this conversation, Detective Blum was dispatched to Ramirez's home to retrieve the property and to have Ramirez brought down to the Pasco County Sheriff's Office. The lead detective affirmatively testified that, before sending Detective Blum to Ramirez's home to retrieve the property, he did not consider Ramirez a suspect in Ms. Boroski's murder. He sent Detective Blum to retrieve the stolen property and to find out what information Ramirez had.

Detective Blum testified that he went to the home and informed Ramirez that he had been instructed to pick up certain items that Grimshaw

had placed in his custody: namely, two rings, a set of handcuffs, and a firearm. Ramirez was hesitant at first. The detective told Ramirez that the conversation between himself and Grimshaw had been recorded. Ramirez then surrendered one ring and stated that the other ring was lost. Ramirez told the detective that he had given the handcuffs to his girlfriend and that he had given the firearm to a friend. The detective, along with Ramirez, retrieved the handcuffs from Ramirez's girlfriend and the firearm from Ramirez's friend.

Detective Blum testified that he inquired from Ramirez as to the location of his parents and was told by Ramirez that his parents were at work. When Ramirez arrived at the sheriff's office, he was taken to an interrogation room, where he was immediately interviewed. The entire interview, which lasted two hours, was videotaped. The videotape of the confession was introduced at the suppression hearing.

Ramirez was interviewed by Detectives Bousquet and Jones, Bousquet being the predominant interrogator. Bousquet testified that he did not read Ramirez his Miranda rights at the very beginning of the interview because at that time Ramirez was not a suspect. Approximately five minutes into the interview, after Ramirez admitted in conclusory fashion to being in Ms. Boroski's home on the night of the murder but before admitting to killing her, Bousquet warned Ramirez of his Miranda rights. It was not until after Bousquet read Ramirez his rights and after Ramirez acknowledged that he still wanted to speak with the detectives that Ramirez discussed in detail how he and Grimshaw broke into Ms. Boroski's home, killed Ms. Boroski's dog, tied Ms. Boroski to her bed, raped Ms. Boroski, stole

her property, kidnapped Ms. Boroski, and then, finally, marched Ms. Boroski 200 feet into an open field and shot her twice in the head. After going through an initial version of the episode, Ramirez was asked to sign a voluntary waiver for a search of his room in his house and a written waiver of his Miranda rights. Ramirez signed both documents and thereafter continued with more sordid details about the criminal episode.

At the hearing on the motion to suppress, the trial court heard live testimony from Detective Blum and Detective Bousquet and viewed the videotape of the interview. At the end of the evidence and argument, the trial judge denied Ramirez's motion to suppress:

> It appears to the Court that at first, this defendant was a potential witness to the Grimshaw case, and as soon as it appears that he might have some involvement, they quickly gave him Miranda. At all times during his questioning, he spoke clearly and logically and did not appear to be under any stress.
>
> The striking is characterized by the defense attorney. I'll agree it could be called slapping. I don't think it was that prevalent. I think you can analogize it to a coach encouraging one of the kids on his baseball team by whacking him on the butt or whatever, as kind of a form of encouragement. Obviously, the methodology used here by Detective Bousquet was to

appear as a friend, and I think he carried that part of his role out very well.

They got water for this young man, they offered to get him some food at one point. He even put his arms around him after the young man had made his confession, so to speak. I think there may have been some genuine sympathy shown by the detective. I'd – no one likes to see a young boy get into trouble, but this is a very serious charge.

I saw no sign of what I would call abuse. This young man at no time appeared to be in fear or suffering in any way.

As far as Miranda, I agree the original Miranda could have been done more thoroughly, but I think at that point, it was done just to protect themselves because it appeared it might – could be that man could be implicated. And his physical affirmation and his verbal affirmation is as good as you'll find in most cases. The written affirmation is, and the consent to search later on, might even be superfluous. They certainly had enough information to get a search warrant if they wanted it without getting the consent signed by the young man.

The Court's impressed that this young man seems pretty clear-

> headed and seems to know pretty well what was going on during this. And then after he realized that he was in hot water, then he first kind of got sad, you might say. But I'll deny the motion to suppress.
>
> (A-32-38)(Footnotes Omitted)

Ramirez was convicted of the first degree murder of Mildred Boroski and sentenced to death. On appeal to the Florida Supreme Court, Ramirez challenged, among other things, the admission of his confession. In a 4 to 3 decision a majority of the Florida Supreme Court agreed that the confession was illegally obtained, reversed the conviction and ordered a new trial. A motion for rehearing filed on behalf of the State of Florida was denied on September 13, 1999. (A-53)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE FLORIDA SUPREME COURT IN RAMIREZ V. STATE, WHICH CONFLICTS WITH THIS COURT'S DECISIONS IN OREGON V. ELSTAD, 470 U.S. 298 (1985), FARE V. MICHAEL C., 442 U.S. 707 (1979) AND COLORADO V. CONNELLY, 479 U.S. 157 (1986) BY HOLDING THAT THE VIDEOTAPED CONFESSION GIVEN BY 17 YEAR OLD RAMIREZ, AFTER A READING AND WAIVER OF HIS CONSTITUTIONAL RIGHTS AS SET FORTH IN MIRANDA V. ARIZONA, 384 U.S. 436 (1966), BUT AFTER HE HAD MADE PREVIOUSLY UNWARNED, AND UNCOERCED STATEMENTS, WAS OBTAINED IN VIOLATION OF MIRANDA, IMPOSES RESTRICTIONS ON THE GOVERNMENT UNDER FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SPECIFICALLY REFRAINED FROM IMPOSING IN CONNELLY, ELSTAD AND FARE.

On July 8, 1999, in a 4 to 3 decision, the Florida Supreme Court reversed Nathan Joe Ramirez' conviction and sentence for the first degree murder of Mildred Boroski, a septuagenarian widow.[2] The court found that Ramirez' videotaped confession, given after a reading and waiver of his Miranda rights, was obtained in violation of Miranda. The Florida Supreme Court's determination that Miranda and its progeny demand that the confession of Nathan Joe Ramirez should have been suppressed is

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[2] Ramirez v. State, 24 Fla. L. Weekly S353 (Fla. 1999) (A-1-52)

baseless in fact and law.[3] As will be demonstrated below, the Florida Supreme Court has misinterpreted and misapplied this Court's decisions in Oregon v. Elstad, 470 U.S. 298 (1985), Fare v. Michael C., 442 U.S. 707 (1979) and Colorado v. Connelly, 479 U.S. 157, 167 (1986). By doing so, it has imposed restrictions on the government under federal constitutional law that this Court specifically refrained from imposing in Elstad, Fare and Connelly. Based on the following, petitioner urges this Court to grant the instant petition and summarily reverse the order of the court below.

a.) Oregon v. Elstad:

In Elstad, this Court held that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. Elstad, 470 U.S. at 318. In so finding this Court concluded that the traditional exclusionary rule applicable to "fruits" of unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution is not applicable to situations in which police officers during a custodial interrogation solicit incriminating statements without first advising the defendant of his Miranda rights. "The failure of police to administer Miranda warnings does not mean that the statements received have actually been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. Elstad, at 310. Thus, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of

---

[3] In the response to the state's motion to stay in state court, respondent asserted that the decision rested on state law. While the Florida Supreme Court made reference to both the state constitution and state law, the decision of the court rested squarely on its interpretation of federal law. Therefore, this Court has jurisdiction to review the instant case. Oregon v. Hass, 420 U.S. 714 (1975).

compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." Id. at 314.

Despite the nearly identical circumstances in Elstad and the instant case,[4] the Florida Supreme Court attempted to distinguish Elstad on the basis of, "[t]he manner in which the rights were administered in this case was not a 'thorough and careful administration' of the rights, such as those that rendered the subsequent confession admissible in Elstad." (A-11) Instead, the majority concluded that "the actions of the police in this case were the kind of 'cajoling' and 'trickery' about which this Court warned in Miranda."

The "cajoling" and "trickery" to which the court referred was apparently in reference to two statements from the detectives. The first was a statement by Detective Bousquet. At the beginning of the interview, before advising Ramirez of his rights, Detective Bousquet stated:

> [R]esources indicate that you may have some involvement in the case . . . . What I want you to do is I want you to be honest with me. The indication we have is that both you and John [Grimshaw] are involved. . . . I want you to tell

---

[4] The only distinction between the cases concerns the state's position on initial custody. In Elstad, the state conceded that Elstad was in custody at the time of the initial questioning. In the instant case, petitioner maintained below, and continues to assert, that Ramirez was not in custody prior to implicating himself in the crime. Although the majority of the Florida Supreme Court found probable cause existed to arrest Ramirez, the officers testified that Ramirez was not considered to be a suspect at the time Detective Blum was sent to his home and that Ramirez was contacted only as a possible witness.

> me what happened that night. I know you were there. I wouldn't be here if I didn't know that. You know what I'm saying?

After these statements by the detective, Ramirez admitted breaking into the victim's house the night of the murder. At that point, Detective Jones immediately interrupted the interview, saying:

> Why don't you let Nate [Ramirez] know about his rights. I mean, he's already told us about going in the house and whatever. I don't think that's going to change Nate's desire to cooperate with us.[5]

Notably, the Florida Supreme Court does not conclude that Miranda warnings were not given to Ramirez, as they are plainly shown on the videotape as having been given not once but twice. Nor does the court find that the confession itself was involuntary. Rather, the thrust of the court's decision to suppress Ramirez's pretrial confession is based on a conclusion that the suggestion by the lead detective before Miranda was given, that he would want to cooperate because he had already told them he was involved, rendered Ramirez's subsequent waiver of his Miranda rights involuntary. The Florida Supreme Court reasoned that Detective Jones' statement served to exploit Ramirez' prior unwarned statements, thereby resulting in a Miranda violation. (A-11) This holding is in direct conflict with Elstad. The Elstad Court

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[5] Ramirez then asked if he was "like being placed under arrest?" to which Detective Blum responded, "No, no, I'm just reading your rights at this time." After the Miranda rights were read to Ramirez, he waived those rights and agreed to answer questions. Ramirez then gave a full confession to his part in the rape, kidnapping and first degree murder of Mildred Boroski. After Ramirez admitted being the shooter, the detectives explained his rights to him once again. During the second reading of Miranda, Ramirez interrupted and said, "I understand." Nevertheless, Miranda was given to him fully a second time and he signed a written waiver.

specifically rejected the argument that once the "cat was out of the bag" and the defendant had given an unwarned, yet uncoerced, statement, that the giving of the statement itself impaired a defendant's ability to give a valid waiver that only time, a change of place and a change in interrogators could dissipate the allegedly "coercive impact" of the inadmissible statement. The Court explained:

> This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-Miranda warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. See 61 Ore.App., at 679, 658 P.2d, at 555 (Gillette, P.J., concurring). This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself. Cf. Michigan v. Mosley, 423 U.S. 96, 107-111, 96 S.Ct. 321, 328-330, 46 L.Ed.2d 313 (1975) (WHITE, J., concurring in result). When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.
>
> ***There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case.*** Justice BRENNAN's contention that it is impossible to perceive any causal distinction

between this case and one involving a confession that is coerced by torture is wholly unpersuasive. (FN3) Certainly, in respondent's case, the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister," Dunaway v. New York, 442 U.S., at 220, 99 S.Ct., at 2261 (STEVENS, J., concurring), or an intervening event such as the exchange of words respondent had with his father. We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights.

Elstad 470 U.S. at 312-314 (emphasis added)

It is very significant to this analysis that the interview of Ramirez was videotaped. This is a fact which should militate against exclusion of the evidence. Such videotaping ensures against extracting confessions by way of physical or psychological coercion, which is what the constitution prohibits.

Ramirez voluntarily came to the station ***as a possible witness***,[6] he was read Miranda from the printed card as soon as he implicated himself in the crime. He waived those rights and gave a voluntary and uncoerced confession. Ramirez was then read Miranda once again. The videotape reflects that in the middle of the *second reading* to him of the Miranda rights, Ramirez interrupted the reading and said, "I understand it." The detective continued with the complete reading of the rights despite this unequivocal statement by Ramirez that he already understood his rights. Moreover, the record shows that after the second reading, Ramirez signed the written waiver form. After signing the written waiver, Ramirez told the officers ***again*** about being in Mrs. Boroski's house, wearing gloves, getting the gun and bullets, cutting the screen, breaking the window, using the crowbar, tying Mrs. Boroski's feet and hands while she lay on her stomach, getting the knife, killing and disposing of the dog, taking money

---

[6] In Elstad, this Court notes the problems inherent in determining when a suspect or witness is in "custody" for Miranda purposes, explaining:

> Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." Michigan v. Tucker, supra, 417 U.S., at 446, 94 S.Ct., at 2365. If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.
>
> 105 S.Ct. at 1293

out of Mrs. Boroski's purse, driving Mrs. Boroski out to the field and shooting Mrs Boroski.

Thus, even if the first waiver and confession were invalid, a proposition with which petitioner disagrees, under Elstad the second signed waiver and confession is further evidence that the initial waiver was voluntary. The holding in Elstad demands that Ramirez's conviction be reinstated.

b.) Fare v. Michael C.

The majority decision also conflicts with the holding in Fare v. Michael C., 442 U.S. 707 (1979) a case in which this Court reviewed the validity of a Miranda waiver by a juvenile defendant. Although the Florida Supreme Court states that the instant case stands "in sharp contrast" to Fare, as noted by the dissent in Ramirez, these "two cases are fairly similar and Fare supports affirmance, not reversal, of the trial court's order." (A-11)

Like 17 year old Nathan Ramirez, 16 year old Michael C. challenged a ruling denying his motion to suppress a confession on the basis that his waiver of Miranda was the product of police coercion. Fare at 727. Upon rejecting this argument, the Fare Court held that the totality of the circumstances test used for adults was to be used with juvenile confessions as well. The Court included the following factors for consideration, "the juvenile's age, experience, education, background, and intelligence." Id. at 725.

As in Fare, there is no indication that Ramirez was of insufficient intelligence to understand the rights he was waiving, or the consequences of that waiver. Fare, at 99 S.Ct. 2572. Ramirez was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit. In fact, the videotape shows that the entire interview only lasted two hours. Admittedly, Ramirez did not have the extensive criminal history that the defendant in Fare had, but he was no novice to the legal system

either.[7] As the following establishes, the waiver of rights, in the instant case, was as voluntary, knowing and intelligent as the waiver in Fare. The lower court's opinion in In re Michael C., 579 P.2d 7, 8 (Cal. 1978), reversed, Fare v. Michael C., 442 U.S. 707 (1979), reflects that on February 4, 1976, police interrogated Michael C. at the Van Nuys police station. After advising the defendant of his Miranda rights, the police interrogating officer continued the conversation as follows: response :

> Q. . . . Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. Can I have my probation officer here?

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[7] The record reflects that on September 23, 1993, Ramirez was arrested and charged with burglarizing an automobile. Ramirez entered an admission of guilt and spent four days in secure detention, after which he was placed in home detention. Ramirez was also required to attend six sessions of a seminar entitled the "Consequences of Crime." As Florida Supreme Court Justice Wells lamented, "How many arrests must a juvenile have before the majority of th[e Florida Supreme] Court would hold that the defendant is experienced in the criminal justice system? This opinion in reality creates considerable uncertainty as to whether a juvenile may validly waive his or her Miranda rights." (A-48)

Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

A. How I know you guys won't pull no police officer in and tell me he's an attorney?

Q. Huh?

A. (Repeat of last answer.)

Q. Your probation officer is Mr. Christiansen.

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you." (Emphasis added.)

Id., 579 P.2d at 8

A review of the videotape, in the instant case, reveals that there is no material difference between the way the officers in Fare administered the Miranda warnings and secured a waiver and the way Detectives Bousquet and Jones obtained the waiver and confession.

In an attempt to distinguish Fare, the majority in Ramirez makes an incredulous leap of logic in stating that Detective Jones'

statement, "I mean, he's already told us about going in the house and whatever. I don't think [the Miranda warnings are] going to change [Ramirez'] desire to cooperate with us," somehow renders an otherwise voluntary confession inadmissible because it minimizes the significance of Miranda. As in Moran v Burbine, 475 U.S. 412 (1986) the record here "is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements." Moran, 475 U.S. at 421.

Based on the totality of circumstances, including the absence of coercion or lengthy interrogations and Ramirez's repeated waiver of Miranda, the Florida Supreme Court's conclusion that the instant case stands "in sharp contrast" to Fare v. Michael C., 442 U.S. 707 (1979), is without factual or legal basis.

c.) Colorado v. Connelly

The Florida Supreme Court's decision in Ramirez also rested on the premise that this Court has placed a "heavy burden" on the State to demonstrate that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel. This conclusion conflicts with the clear statement of this Court in Colorado v. Connelly, 479 U.S. 157, 167 (1986), wherein this Court stated, "Although we have stated ***in passing*** that the State bears a "heavy" burden in proving waiver, we have never held that the "clear and convincing evidence" standard is the appropriate one." Connelly, 479 U.S. at 167-68 (emphasis added; citations omitted). Rather, this Court held that the State need prove waiver only by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. at 167-68.

As the dissent in Ramirez noted:

> FN 19: "I take issue with the following statement by the majority:
>
> > Moreover, where a confession is obtained after the administration of Miranda warnings, the State bears

> a "heavy burden" to demonstrate that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile. Colorado v. Connelly, 479 U.S. 157, 167 (1986).
>
> Majority op. at 13. To say that a party which bears the burden of production or the burden of proof by the preponderance of the evidence standard carries a "heavy burden" is a non sequitur."

(A-41, Wells, J., dissenting.)

Justice Wells concluded "that a fair and accurate review of the police investigation into this crime and the videotape of Ramirez's confession shows by a preponderance of the evidence no "lawless" or coercive conduct by the police so as to require that this otherwise indisputably voluntary confession be found inadmissible on the basis of an invalid waiver. See Connelly, 479 U.S. at 166-67. This was the clear decision of the trial judge at the suppression hearing, which I accept as to the facts and approve as to the law." (A-42, Wells, J., dissenting)

Moreover, the Connelly, Court stated that "[t]he voluntariness of a waiver of [the Miranda] privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." 479 U.S. at 170, The evidence, in the instant case, in no way supports an assertion that Ramirez's waiver was the product of "police overreaching" or "cajoling" or "trickery." To exclude this confession because of the mannerisms used by the detectives in the interview, which can

only be categorized as valid police techniques,[8] will only serve to deter the videotaping of such interviews, which is contrary to the reasoning underlying the exclusionary rule.

CONCLUSION

In sum, the totality of the factors here do not show coercive police activity or involuntariness on the part of Ramirez. The situation here is that the police investigation into the brutal murder of Ms. Boroski led law enforcement to Ramirez as having possession of some of the widow's property. It was certainly reasonable for law enforcement to attempt to obtain information as to how Ramirez came into possession of the property. A viewing of the videotape belies the impression left by the majority opinion of the Florida Supreme Court that the interrogation went on a long time before Ramirez was read his rights. The videotape further belies the impression left by the majority opinion that any undue physical or psychological coercion was used in this investigation.

As Justice Wells noted, "Certainly, most criminal suspects would be better advised not to waive their Miranda rights, but our cases permit waiver because the Courts recognize that admissions of guilt are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. Moran, 475 U.S. at 424." (A-51) While no one suggests that police interrogations should be unfettered by constitutional restraints, the Miranda violation found by the court, in the instant case, is a technical violation, not a constitutional one.[9] See, Michigan v.

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[8] See, Illinois v. Perkins, 496 U.S. 292 (1990)(noting that Miranda does not forbid mere strategic deception and that confessions remain a proper element in law enforcement.) In a different context, this Court has indicated that the judiciary should not exercise a "chancellor's foot veto" over the methods of law enforcement's investigative techniques of which they may not approve. See, Hampton v. U.S., 425 U.S. 484, 491 (1976).

[9] In U.S. v. Dickerson, 166 F.3d 667 (4th Cir.1999) petition for certiorari filed 7/30/99, No. 99-5525, the U.S. Circuit Court of Appeals considered whether Congress had the power to overrule Miranda. The court

Tucker, 417 U.S. 433 (1974) (sanctioning the admission of the fruits of a Miranda violation, but only because the violation was technical and the interrogation itself noncoercive); Withrow v. Williams, 507 U.S. 680, 695 (1993)(Miranda's safeguards are not constitutional in character, but merely 'prophylactic.') Accordingly, the cost to society of releasing Ramirez, who voluntarily confessed that he was responsible for the heinous murder of Mrs. Boroski, substantially outweighs the benefit of punishing police officers who acted in a constitutionally reasonable manner. See, Oregon v. Elstad, 470 U.S. 298, 313 (1985) ("This immunity comes at a high cost to legitimate law enforcement

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noted that, "whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in Miranda is required by the Constitution. Clearly it is not." Id. at 672. The court further noted that:

> "it is certainly 'well established that the failure to deliver Miranda warnings is not itself a constitutional violation.' United States v. Elie, 111 F.3d 1135, 1142 (4th Cir.1997) (citing Supreme Court cases); see also Correll v. Thompson, 63 F.3d 1279, 1290 (4th Cir.1995) (holding that "a technical violation of Miranda [is not necessarily] a Fifth Amendment violation"). As a consequence, the irrebuttable presumption created by the Court in Miranda--that a confession obtained without the warnings is presumed involuntary--is a fortiori not required by the Constitution. [] Accordingly, Congress necessarily possesses the legislative authority to supersede the conclusive presumption created by Miranda pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts. See Carlisle v. United States, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996); Vance v. Terrazas, 444 U.S. 252, 265, 100 S.Ct. 540, 62 L.Ed.2d 461 (1980); Palermo v. United States, 360 U.S. 343, 345-48, 79 S.Ct. 1217, 3 L.Ed.2d 1287 (1959); cf. Alfredo Garcia, Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?, 10 St. Thomas L.Rev. 461, 461-65, 479 (1998) (concluding that § 3501 "overruled Miranda " but arguing that Miranda was already dead).
>
> Dickerson, at 166 F.3d 690-691

The 4th Circuit concluded that the irrebuttable presumption created by Miranda was overruled by 18 U.S.C.A. § 3501 and, accordingly, "[n]o longer will criminals who have voluntarily confessed their crimes be released on mere technicalities."Id. at 692.

activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself"); New York v. Quarles, 467 U.S. 649 (1984)(finding that societal interest in protecting public can outweigh doctrinal underpinnings of Miranda under certain circumstances.)

In light of the facts and circumstances as presented in this case, including the absence of any coercive police activity or wrongdoing, the respondent's repeated waiver of his rights and the voluntary nature of the confession, petitioner urges this Court to grant certiorari, summarily reverse the holding of the Florida Supreme Court suppressing the confession of Nathan Joe Ramirez and remand to the court below for further proceedings.

Respectfully submitted,

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COUNSEL FOR PETITIONER

No. _____

IN THE UNITED STATES SUPREME COURT

October Term 1999

STATE OF FLORIDA,
Petitioner,

v.

NATHAN JOE RAMIREZ,
Respondent.

APPENDIX TO WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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Supreme Court of Florida

No. 89,377

NATHAN JOE RAMIREZ,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 8, 1999]

PER CURIAM.

We have on appeal the judgment and sentence of the trial court imposing the death penalty upon Nathan Ramirez. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons stated herein, we reverse the conviction and sentence and remand for a new trial.

Nathan Ramirez and Jonathan Grimshaw were both found guilty, after separate trials, of the first-degree murder of Mildred Boroski. Grimshaw was sentenced to life in prison,[1] and Ramirez, age seventeen, was sentenced to death.

On appeal, Ramirez raises four issues: (1) that the State failed to sustain its burden of showing that his confession was

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[1] Grimshaw's conviction and life sentence were per curiam affirmed. See Grimshaw v. State, 704 So. 2d 529 (Fla. 2d DCA 1997). Grimshaw was several months older than Ramirez, one grade ahead of him, and had a history of more extensive disciplinary problems, including allegations of inappropriate sexual advances against older women.

voluntary and taken in compliance with Miranda[1]; (2) that his constitutional right to confront and cross-examine witnesses against him was violated when a sheriff's detective testified regarding details of Grimshaw's confession implicating Ramirez; (3) that the cold, calculated and premeditated aggravator (CCP) was not supported by the evidence and was inconsistent with a finding of the avoid arrest aggravator; and (4) that the imposition of the death penalty was disproportionate. We turn now to our consideration of these issues.

SUPPRESSION OF THE CONFESSION

Both prior to and during trial, Ramirez moved to suppress his confession. The trial court denied both motions and the confession was introduced as substantive evidence against him. The pertinent facts surrounding the confession follow.

The victim's body was found in an open field not far from her home. Her death was caused by two gunshot wounds to the head. The subsequent investigation revealed that someone had broken into her home and stolen some items of jewelry, her gun, and about $35. There was evidence that the victim had been raped before her death.

Grimshaw, who was the victim's neighbor, soon became a suspect. After several interviews and a final interrogation lasting several hours, Grimshaw confessed his involvement in the crime. Although Grimshaw gave several inconsistent versions of events, he eventually admitted his involvement in the crime, but pointed to Ramirez as the ringleader.

In order to convince the police of the truthfulness of his statements regarding Ramirez's involvement, Grimshaw phoned Ramirez from the station while the sheriff's detectives listened in and recorded the call. During the call, Ramirez and Grimshaw discussed the items of physical evidence related to the crime that

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

were in Ramirez's possession and made plans to destroy the victim's automobile to eliminate evidence of the crime.

Ramirez was at home around three o'clock that afternoon when, shortly after the phone call, a sheriff's deputy arrived wearing a badge and carrying a firearm. The deputy asked Ramirez to produce the physical evidence in his possession linked to the murder, including the suspected murder weapon and some of the victim's jewelry. According to the deputy, Ramirez was a "little hesitant at first, [and] denied having the articles." After the deputy informed Ramirez that he knew about the phone conversation with Grimshaw, Ramirez turned over the items that were in the house and accompanied the deputy to retrieve other items. The deputy then asked Ramirez if he would be "willing to come with [him] to the sheriff's office" to speak with a detective. Once transported to the station, Ramirez was placed in a small room and questioned by two other detectives.

The entire interrogation at the station was videotaped and is part of the record on appeal. The videotape reveals that the lead detective began the interrogation by questioning Ramirez about how the items came into his possession. When Ramirez initially claimed that Grimshaw gave him the items, one of the detectives informed Ramirez that:

> [R]esources indicate that you may have some involvement in the case . . . . What I want you to do is I want you to be honest with me. The indication we have is that both you and John [Grimshaw] are involved. . . . I want you to tell me what happened that night. I know you were there. I wouldn't be here if I didn't know that. You know what I'm saying?

After these statements by the detective, Ramirez admitted breaking into the victim's house the night of the murder.

It was only after this admission that the second detective suggested that Ramirez be informed of his Miranda rights. The detective said:

> Why don't you let Nate [Ramirez] know about his rights. I mean, he's already told us about going in the house and whatever. I don't think that's going to change Nate's desire to cooperate with us.

Ramirez then asked if he was "like being placed under arrest?" to which the other detective responded, "No, no, I'm just reading your rights at this time." After the Miranda rights were administered, Ramirez acknowledged what the detective had read by nodding and stating, "I guess that is what I'm here for."

Ramirez eventually admitted his involvement not only in the burglary, but also in the murder. He stated that he was the one who shot the victim, denied any involvement in the rape, and claimed that he was acting at Grimshaw's direction. Only after Ramirez fully confessed to the murder did the detectives belatedly obtain a written waiver of his Miranda rights. When Ramirez was asked to sign the waiver of rights form after he had fully confessed, the lead detective asked him to acknowledge that he had not been promised anything or been threatened before giving his statement. Ramirez's response was that the detective had only promised to be his friend.

Both the United States and Florida Constitutions provide that persons shall not be "compelled" to be witnesses against themselves in any criminal matter. U.S. Const. amend. V; Art. I, § 9, Fla. Const. This constitutional guarantee "is fully applicable during a period of custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 460-61 (1966). Thus, to be admissible in a criminal trial, the State must prove that the confession was not compelled, but was voluntarily made. See, e.g., Miranda, 384 U.S. at 442-44; Traylor v. State, 596 So. 2d 957, 964-65 (Fla. 1992).

In Miranda, the United States Supreme Court enunciated a bright-line rule to guard against compulsion and the coercive nature and atmosphere of custodial interrogation, and "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." 384 U.S. at 469. Miranda requires that police inform suspects that

they have the right to remain silent, and that anything they do say can be used against them in court. 384 U.S. at 468-69. Suspects must also be informed that they have a right to an attorney during questioning, and that if they cannot afford an attorney, one will be appointed for them without cost. See id. at 467-76; Traylor, 596 So. 2d at 966.

"The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Miranda, 384 U.S. at 476. The Miranda court concluded that

> without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.

Id. at 467. Therefore, "unless and until [the Miranda] warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the defendant]." Miranda, 384 U.S. at 479. The protections enunciated in Miranda have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution. See Traylor, 596 So. 2d at 964-66.[2]

Ramirez argues that the requirements of Miranda were violated because the warnings were not administered before the interrogation began, rendering his confession to the crime inadmissible. "Interrogation takes place . . . when a person is subjected to express questions, or other words or actions, by a state agent, that a reasonable person would conclude are designed

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[2] Although "our analysis in Traylor [v. State, 596 So. 2d 957 (Fla. 1992),] was grounded in the Florida Constitution, our conclusions were no different than those set forth in prior holdings of the United States Supreme Court." State v. Owen, 696 So. 2d 715, 719 (Fla. 1997).

to lead to an incriminating response." Traylor, 596 So. 2d at 966 n.17. There is no question in this case that Ramirez was subjected to interrogation and was not initially informed of his Miranda rights. However, the State argues that Miranda warnings were not required because Ramirez was not in custody at the time that he was interrogated at the police station. We disagree.

Custody for purposes of Miranda encompasses not only formal arrest, but any restraint on freedom of movement of the degree associated with formal arrest. See Arbelaez v. State, 626 So. 2d 169, 175 (Fla. 1993). A person is in custody if a reasonable person placed in the same position would believe that his or her freedom of action was curtailed to a degree associated with actual arrest. See Traylor, 596 So. 2d at 966 n.16; Roman v. State, 475 So. 2d 1228, 1231 (Fla. 1985). "The proper inquiry is not the unarticulated plan of the police, but rather how a reasonable person in the suspect's position would have perceived the situation." Davis v. State, 698 So. 2d 1182, 1188 (Fla. 1997), cert. denied, 118 S. Ct. 1076 (1998); see Roman, 475 So. 2d at 1231.

The question of whether a suspect is in custody is a mixed question of law and fact. See Thompson v. Keohane, 516 U.S. 99, 106-07 (1995). The four-factor test adopted by the Iowa Supreme Court provides guidance in making the determination whether a reasonable person in the suspect's position would consider himself in custody: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning. See State v. Countryman, 572 N.W.2d 553, 558 (Iowa 1997). Although not set forth as a "four-factor test," our case law includes a consideration of these same factors. See Caso v. State, 524 So. 2d 422, 424 (Fla. 1988); Roman, 475 So. 2d at 1231; Drake v. State, 441 So. 2d 1079, 1081 (Fla. 1983).

Considering these factors, it is uncontroverted that by the time the detective came to Ramirez's home to request that he turn over the items of physical evidence related to the crime, Grimshaw

had implicated Ramirez as a principal in the murder, and the police had listened in on the phone call with Grimshaw during which Ramirez admitted that he had items of physical evidence directly related to the crime. By the time Ramirez was brought to the police station for questioning, he had in fact turned over that physical evidence. The detectives told Ramirez that they knew he was involved. While the police may not have told Ramirez that he was under arrest, he was never told he was free to leave. They undoubtedly had probable cause to arrest him.

The record reflects that Ramirez was a juvenile (he had just turned seventeen) and had only limited contact with the justice system.[3] We conclude that not only a reasonable juvenile, but even a reasonable adult in Ramirez's position, would have believed that he was in custody at the time of the interrogation at the police station: he was questioned in a small room in the police station by two detectives, he was never told he was free to leave, and all of the questions indicated that the detectives considered him a suspect.

Short of being handcuffed and being told that he was under arrest, we cannot perceive of circumstances that would be more indicative of a custodial interrogation than the circumstances of the interrogation in this case. Therefore, the Miranda warnings should have been administered prior to any questioning. See Caso, 524 So. 2d at 422; Drake, 441 So. 2d at 1081; see also B.S. v. State, 548 So. 2d 838 (Fla. 3d DCA 1989). Accordingly, the statements elicited prior to the Miranda warnings should have been suppressed, and it was error to admit them against Ramirez.

As to the statements elicited after the Miranda warnings were finally given, the United States Supreme Court explained in

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[3] It would appear that Ramirez had very limited experience with either the adult or juvenile justice system. Ramirez indicated in his confession that he had been involved in a couple of fights at school. In 1993, when Ramirez was fifteen, he was arrested for taking ten dollars from the dashboard of a pick-up truck through an open window. Adjudication was withheld, and he was placed in an alternative program including counseling and community service, which he successfully completed.

Oregon v. Elstad, 470 U.S. 298, 310-11 (1985), that the failure to administer the Miranda warnings before eliciting a confession does not necessarily render any subsequently warned statement inadmissible. Instead, if a "careful and thorough administration" of the Miranda warnings are later given, and the Miranda rights are waived, the condition that "rendered the unwarned statement inadmissible" is "cure[d]." Elstad, 470 U.S. at 311; see Davis, 698 So. 2d at 1189; Henry v. State, 613 So. 2d 429, 431 (Fla. 1992).

In Elstad, the police first questioned the defendant, who was eighteen and in his home in the presence of his parents, without the Miranda warnings having been administered. 470 U.S. at 300-01. The defendant responded to the questioning with inculpatory statements. See id. at 301. Police then transported him to the station and fully advised him of his rights, whereafter he executed a written statement. See id. at 301-02. The Supreme Court concluded that the first statements were properly suppressed, but that it was not necessary to suppress the statements made after the Miranda waiver, which was knowing, intelligent and voluntary. See id. at 315-18.

By contrast, in this case police began questioning Ramirez at the police station after failing to first administer the Miranda warnings. When the police finally administered the Miranda warnings, the administration was not careful and thorough. To the contrary, there was a concerted effort to minimize and downplay the significance of the Miranda rights.

As explained in Moran v. Burbine, 475 U.S. 412, 421 (1986), Miranda "echo[ed]" the standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), in holding that a defendant may waive the Miranda rights "provided the waiver is made voluntarily, knowingly and intelligently." (Quoting Miranda, 384 U.S. at 444). Whether the rights were validly waived must be ascertained from two separate inquiries:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of free and deliberate choice rather than

> intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.

Moran, 475 U.S. at 421 (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)); see Colorado v. Spring, 479 U.S. 564, 573 (1987); Sliney v. State, 699 So. 2d 662, 668 (Fla. 1997), cert. denied, 118 S. Ct. 1079 (1998).

The State bears the burden of proving that the waiver of the Miranda rights was knowing, intelligent and voluntary. See Sliney, 699 So. 2d at 667; Thompson v. State, 548 So. 2d 198, 204 (Fla. 1989). Moreover, where a confession is obtained after the administration of the Miranda warnings, the State bears a "'heavy burden'" to demonstrate that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile. Colorado v. Connelly, 479 U.S. 157, 167 (1986); Fare, 442 U.S. at 724; Miranda, 384 U.S. at 475; W.M. v. State, 585 So. 2d 979, 981 (Fla. 4th DCA 1991). The State must establish its "'heavy' burden" by the "preponderance of the evidence." Connelly, 479 U.S. at 167-68; see Balthazar v. State, 549 So. 2d 661, 661 (Fla. 1989); W.M., 585 So. 2d at 983. As the United States Supreme Court has made clear, the ultimate issue of voluntariness is a legal rather than factual question. See Miller v. Fenton, 474 U.S. 104, 109 (1985).

The "totality of the circumstances" to be considered in determining whether a waiver of Miranda warnings is valid based on the two-pronged approach of Moran may include factors that are also considered in determining whether the confession itself is voluntary. See Sliney, 669 So. 2d at 669; see also State v. Sawyer, 561 So. 2d 278, 284-85 (Fla. 2nd DCA 1990). The factors that we consider relevant here include: (1) the manner in

which the Miranda rights were administered, including any cajoling or trickery; see Miranda, 384 U.S. at 476; Brewer v. State, 386 So. 2d 232, 237 (Fla. 1980); (2) the suspect's age, experience, background and intelligence, see State v. S.L.W., 465 So. 2d 1231, 1232 (Fla. 1985) (quoting Fare, 442 U.S. at 724-25); Doerr v. State, 383 So. 2d 905, 907 (Fla. 1980); (3) the fact that the suspect's parents were not contacted and the juvenile was not given an opportunity to consult with his parents before questioning, see Doerr, 383 So.2d at 907; (4) the fact that the questioning took place in the station house, see Drake, 441 So. 2d at 1081; and (5) the fact that the interrogators did not secure a written waiver of the Miranda rights at the outset, see Sliney, 699 So. 2d at 669 n.10; Traylor, 596 So. 2d at 966.

First, we find the manner in which the Miranda rights were administered to be a critical factor in determining that the waiver in this case was not knowing, voluntary or intelligent. The Supreme Court has explained that the question of whether the suspect has validly waived his rights "is not one of form." Fare, 442 U.S. at 724 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)). "[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." Miranda, 384 U.S. at 476. The voluntariness of a waiver "depend[s] on the absence of police overreaching." Connelly, 479 U.S. at 170.

In this case, the Miranda warnings were not given until Ramirez had made significant admissions of guilt. Then, immediately before administering the Miranda warnings, one of the detectives minimized their significance by suggesting in a casual, offhand manner that he did not expect Ramirez to invoke his rights: "I mean, he's already told us about going in the house and whatever. I don't think [the Miranda warnings are] going to change Nate's desire to cooperate with us."

To state to a juvenile that the Miranda warnings would not change his desire to cooperate, thus suggesting that they have no significance, undermines the very purpose of Miranda. As we have explained: "[T]he requirement of giving Miranda warnings before custodial interrogation is a prophylactic rule intended to

ensure that the uninformed or uneducated in our society know they are guaranteed the rights encompassed in the warnings." Davis, 698 So. 2d at 1189; see New York v. Quarles, 467 U.S. 649, 653 (1984).

The manner in which the rights were administered in this case was not a "thorough and careful administration" of the rights, such as those that rendered the subsequent confession admissible in Eldstad. Instead, the actions of the police in this case were the kind of "cajoling" and "trickery" about which the Supreme Court warned in Miranda. Cf. People v. Honeycutt, 570 P.2d 1050, 1055 (Cal. 1977). Moreover, by suggesting that Ramirez would not invoke his rights because he had "already told [them] about going into the house," the detectives exploited his prior unwarned statements and used them against him. In contrast, in Elstad the Supreme Court observed that the officers in that case did not exploit the suspect's unwarned admissions to secure the subsequent waiver of the rights. 470 U.S. at 316. This case is also in sharp contrast to Fare, where the police officers interrogating the suspect "took care" to ensure that the suspect understood his rights. 442 U.S. at 726.

Further, after being told he was to be read his rights, Ramirez responded by asking if he was under arrest. The detectives answered "no." However, by the time the warnings were given, Ramirez had already implicated himself in the crime and the detectives had independent corroboration of his involvement and ample probable cause to arrest him for murder. In fact, the detectives did arrest Ramirez upon completion of the interrogation. It is simply inappropriate for the police to make a representation intended to lull a young defendant into a false sense of security and calculated to delude him as to his true position at the very moment that the Miranda warnings are about to be administered. See Brewer, 386 So. 2d at 237; Sawyer, 561 So. 2d at 290-91; see also Frazier v. Cupp, 394 U.S. 731, 739 (1969); Escobar v. State, 699 So. 2d 984, 987 (Fla. 1997), cert. denied, 118 S. Ct. 1548 (1998).

In conjunction with the circumstances surrounding the administration of the Miranda warnings, we consider the fact that

Ramirez was a juvenile and had only limited experience with the with the criminal justice system. See supra note 4. Neither this Court nor the United States Supreme Court has adopted a bright-line rule that would render a confession by a juvenile involuntary. See Gallegos v. Colorado, 370 U.S. 49, 52-55 (1962); State v. Francois, 197 So. 2d 492, 493-95 (Fla.1967). Instead, we look to the juvenile's age, along with his experience, education, background and intelligence,[4] in assessing whether the waiver is knowing, voluntary and intelligent. See S.L.W., 465 So. 2d at 1232 (quoting Fare, 442 U.S. at 724-25); see also Doerr, 383 So. 2d at 907; Rimpel v. State, 607 So. 2d 502, 503 (Fla. 3d DCA 1992).

In conjunction with this age-related inquiry, we also consider the fact that because Ramirez was a juvenile, police were obligated to attempt, and "continue such attempt," to notify his parents upon taking him into custody. § 39.037(2), Fla. Stat. (1995) (emphasis supplied).[5] Although the failure to comply with this statutory requirement does not render a confession involuntary, we have found that: "'The fact that a juvenile's confession was given before he had the opportunity to talk with his parents or an attorney is certainly a factor militating against its admissibility.'" Doerr, 383 So.2d at 907 (quoting Doerr v. State, 348 So. 2d 938, 941 (Fla. 2d DCA 1977));[6] see also Allen v.

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[4] We are aware of testimony from the penalty phase that although Ramirez was seventeen, he had learning disabilities and was performing academically at an eighth or ninth grade level. He had an emotional, intellectual and behavioral age of thirteen or fourteen. However, this evidence was not offered at the suppression hearing, and for that reason we do not consider it in our analysis on this issue. See Escobar v. State, 699 So. 2d 984, 987 (Fla. 1997), cert. denied, 118 S. Ct. 1548 (1998).

[5] The current version of this subsection is now located at subsection 985.207(2), Florida Statutes (1997).

[6] Although Doerr v. State, 383 So. 2d 905 (Fla. 1980), was decided under superseded law, see § 39.03(3)(a), Fla. Stat. (1975), the statutory language is "sufficiently similar" to the statute applicable in this case that Doerr's holding "still obtains." Allen v. State, 636 So. 2d 494, 496 n.2 (Fla.

State, 636 So. 2d 494, 496 n.2 (Fla. 1994). We find that this analysis applies with equal force when determining the knowing, intelligent and voluntary nature of a Miranda waiver, especially in light of the manner in which the Miranda warnings were administered in this case.

In Allen, we found that it was error for police to continue questioning the suspect after his mother had requested to speak with him, citing to section 39.037(2). 636 So. 2d at 496. In this case, Ramirez's parents were not even given an opportunity to see or speak with their son before or during his questioning. The fact that Ramirez's parents were not given an opportunity to be present during the interrogation distinguishes such cases as Ross v. State, 386 So. 2d 1191 (Fla. 1980), and Rimpel, where the parents were either present during the juvenile's questioning or offered an opportunity to be present. See also S.L.W., 465 So. 2d at 1232 (juvenile defendant's statement given in driveway of the home of his temporary foster family). Further, this case is distinguishable from Bonifay v. State, 626 So. 2d 1310, 1312 (Fla. 1993), where the suspect was offered an opportunity to have his parents or attorney present at his interrogation, but "specifically did not want his parents to be contacted." Compare Snipes v. State, 24 Fla. L. Weekly S191 (Fla. Apr. 22, 1999) (confession was not involuntary where juvenile's mother had been informed that he was being taken to jail; juvenile had a GED; juvenile was administered the Miranda warnings before confessing; the interrogation lasted for less than twenty minutes; the juvenile signed a written waiver form).

The State maintains that some attempts were made to contact Ramirez's parents earlier. However, the statute would be rendered meaningless if all that is required are perfunctory attempts to contact a juvenile's parents. Here, the State, who must bear the burden of demonstrating statutory compliance, did not

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present evidence of any meaningful or continuing attempt to contact Ramirez's parents.[7]

Finally, when the warnings were administered, they were administered orally. A written waiver of the warnings was not secured until after Ramirez had fully confessed his involvement in the crime. Whether the waiver of the Miranda rights is in writing is one more factor to consider in evaluating the totality of the circumstances. See Sliney, 699 So. 2d at 669 n.10; see also Traylor, 596 So. 2d at 966.

In this case, we stress that neither the veracity nor the credibility of the detectives is at issue, but only the uncontroverted facts, including: the fact that the detectives delayed administering the Miranda warnings until Ramirez made inculpatory admissions; the fact that no careful and thorough administrations of the Miranda rights occurred -- instead, before administering the Miranda warnings the detective diluted their effect by downplaying their significance; the fact that when administering the warnings the detectives used Ramirez's previous unwarned inculpatory statements to suggest he would not invoke his rights; the fact that Ramirez was a juvenile, with little experience in the criminal justice system; the fact that his parents were not present when he was interrogated; and the fact that the waiver of the rights was not in writing. Based on the totality of these circumstances, we find that the oral waiver was invalid as a matter of law. Accordingly, we conclude that the confession should have been suppressed. Because we cannot conclude that the admission of the confession

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[7] The record reflects that Ramirez's parents came to the station house after Ramirez's confession, apparently responding to a message left on their telephone answering machine at home. The record is unclear about any other attempts to contact Ramirez's parents. At the hearing on the motion to suppress, the sheriff's deputy who went to Ramirez's home testified on cross-examination that he knew Ramirez was a minor and asked him where his parents were and how they could be contacted. His testimony does not indicate when this question was asked nor does his testimony at the motion to suppress indicate any response from Ramirez. The videotape reveals that it was only after Ramirez confessed to the crime that the detectives begin to question Ramirez in earnest about the whereabouts of his parents, who both worked for a nursing agency.

was harmless beyond a reasonable doubt, a new trial is required. See State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986).

QUESTIONING REGARDING THE CODEFENDANT'S CONFESSION

Further, since we are reversing for a new trial, we also discuss the erroneous admission of the details of Grimshaw's confession implicating Ramirez. During the cross-examination of one of the detectives during the guilt phase, defense counsel inquired whether it was the true that Grimshaw had given so many versions of events that the police did not know who to suspect, whether it was true that Grimshaw led detectives on a "merry chase" in the wrong direction in a bogus search for the body, whether it was true that Ramirez cast blame on Grimshaw as the leader of events the night of the murder, and whether the detective had any evidence contrary to Ramirez's claims that he was not involved in the sexual assault on the victim and that he murdered her because Grimshaw told him to do so.

On redirect, over objection, the prosecutor was permitted to elicit not just that Grimshaw's confession was "evidence" contradicting Ramirez's claims of what took place, but also details from Grimshaw's confession, including Grimshaw's statement that it was Ramirez who wanted to kill the victim. The prosecutor maintained to the trial court that he was permitted to elicit the details of Grimshaw's statements because Ramirez "brought up" the subject on cross-examination.

The State concedes that under most circumstances it is error to admit the details of a non-testifying codefendant's confession into evidence against the defendant. This is because admission of a codefendant's statements is inadmissible hearsay and violates the Confrontation Clause of the Sixth Amendment to the United States Constitution. See Lee v. Illinois, 476 U.S. 530, 541 (1986); Bruton v. United States, 391 U.S. 123, 128 (1968); Franqui v. State, 699 So. 2d 1312, 1318 (Fla. 1997), cert. denied, 118 S. Ct. 1337 (1998), and cert. denied, 118 S. Ct. 1582

(1998).[8] A codefendant's statements are especially suspect because he has a strong motivation to implicate another, rendering these statements even less credible than ordinary hearsay. See Lee, 476 U.S. at 541; Farina v. State, 679 So. 2d 1151, 1155 (Fla. 1996).

However, the State maintains that the questioning was permissible during the State's redirect because Ramirez himself "opened the door" to this testimony during the cross-examination of the detective during the guilt phase of trial. As an evidentiary principle, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to "qualify, explain, or limit" testimony or evidence previously admitted. Tompkins v. State, 502 So. 2d 415, 419 (Fla. 1986); see Huff v. State, 495 So. 2d 145, 150 (Fla. 1986); Blair v. State, 406 So. 2d 1103, 1106 (Fla. 1981).

The concept of "opening the door" is "based on considerations of fairness and the truth-seeking function of a trial." Bozeman v. State, 698 So. 2d 629, 631 (Fla. 4th DCA 1997). For example, in McCrae v. State, 395 So. 2d 1145, 1151 (Fla. 1980), defense counsel through his questions on direct examination "tactfully attempted to mislead the jury into believing that [the defendant's] prior felony was inconsequential." This Court held that to negate the misleading impression given by

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[8] Although in Franqui v. State, 699 So. 2d 1312, 1318 (Fla. 1997), cert. denied, 118 S. Ct. 1337 (1998), cert. denied, 118 S. Ct. 1582 (1998), the codefendants were tried jointly,

> [t]he fact that the defendants here were tried separately rather than jointly does not vitiate the constitutional infirmity [of admitting the statements of a non-testifying codefendant without allowing the defendant to cross-examine the declarant.] The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant.

Nelson v. State, 490 So. 2d 32, 34 (Fla. 1986) (quoting Hall v. State, 381 So. 2d 683, 687 (Fla. 1979)) (emphasis supplied).

defense counsel's question, the prosecutor was entitled to elicit the nature of the prior felony conviction on cross-examination. See id. at 1152. The Court found that the defendant's

> line of questioning could have deluded the jury into equating appellant's conviction of assault with intent to commit murder with his previous misdemeanors. Consequently, the state was entitled to interrogate [the defendant] regarding the nature of his prior felony in order to negate the delusive innuendoes of his counsel.

Id. at 1152.

The phrase "opening the door" has been utilized interchangeably with the rule of completeness. See, e.g., Larzelere v. State, 676 So. 2d 394, 402 (Fla. 1996). The rule of completeness, however, is a separate evidentiary concept that falls within the general principle of door-opening. Codified at section 90.108, Florida Statutes (1995), the rule of completeness provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him or her at that time to introduce any other part or any other writing or recorded statement that in fairness ought to be considered contemporaneously." This rule has been applied to verbal statements as well. See Christopher v. State, 583 So. 2d 642, 646 (Fla. 1991); see also Reese v. State, 694 So. 2d 678, 683 (Fla. 1997).

"Fairness is clearly the focus of this rule." Jordan v. State, 694 So. 2d 708, 712 (Fla. 1997). Thus, when a party introduces part of a statement, confession, or admission, the opposing party is ordinarily entitled to bring out the remainder of the statement. See Larzelere, 676 So. 2d at 402; see also Christopher, 583 So. 2d at 646. This rule is not absolute, and "the correct standard is whether, in the interest of fairness, the remaining portions of the statements should have been contemporaneously provided to the jury." Larzelere, 676 So. 2d at 402. A good example of this principle is Walsh v. State, 596 So. 2d 756, 757 (Fla. 4th DCA 1992), where the defendant opened the door to the admission of the codefendant's complete

confession by asking questions on cross-examination designed "to glean select portions from [the codefendant's] statement which implicated the [codefendant] in the murder, but not [the defendant.]"

In this case however, the defendant did not elicit any portions or parts of Grimshaw's confession from the officer during cross-examination. Thus, the rule of completeness did not apply to permit the introduction of the details of Grimshaw's confession on redirect. Because the rule of completeness does not apply in this case, the appropriate inquiry here is whether based on considerations of fairness, the door was opened wide enough by defense counsel's questions to permit otherwise inadmissible and unreliable statements to be admitted into evidence. The "general unreliability of inadmissible evidence should be one of the court's considerations in determining whether fairness requires admission." Jordan, 694 So. 2d at 712 (quoting Charles W. Ehrhardt, Florida Evidence § 108.1, at 35 (1995 ed.)).

In Pacheco v. State, 698 So. 2d 593, 595 (Fla. 2d DCA 1997), the Second District found that the State was properly allowed to ask whether the codefendant had implicated the defendant because defense counsel's questions implied that only one other person incriminated the defendant. However the State went too far when it elicited details of the confession:

> The detective's testimony and the taped statement, however, went well beyond the fact that [the codefendant] accused [the defendant] of participating in the crime. This evidence provided specific details about the commission of the offense, and it portrayed Pacheco as the instigator of the crime. [The defendant's] limited questions about Ms. Humphrey's role in his capture did not throw the door open wide enough to admit the entire confession of a codefendant who refused to testify. This evidence was inadmissible; it violated both the hearsay rule and the Confrontation Clause.

Id. at 595 (emphasis supplied). The Second District found that the only issue from cross-examination that warranted explanation was whether anyone else had led the detective to suspect the defendant. Thus, the admission of the details of the codefendant's statement warranted reversal of the conviction. See id. at 595-96.

In this case, the limited questions by the defense counsel on cross-examination of the officer that needed to be clarified or explained on redirect were whether there was any other "evidence" that pointed to Ramirez as the individual who raped the victim or contradicted Ramirez's assertion that he acted at Grimshaw's direction. This inquiry opened the door only to allow the State to explain that Grimshaw's confession contradicted these assertions. It did not open the door to the questions on redirect regarding the details of what Grimshaw stated when Grimshaw was unavailable for cross-examination.

Further, the testimony about the contents of Grimshaw's statement was clearly inadmissible in the penalty phase where the state, again over objection, elicited even more highly inflammatory details of Grimshaw's confession. The State called one of the investigative detectives as the first penalty phase witness. He was asked to review for the jury the details of Grimshaw's confession, which included highly inflammatory statements that Ramirez verbally abused Grimshaw and threatened his life to secure his participation in the crime, anally raped the victim prior to her death, planned to set the victim's house on fire to destroy evidence, turned and smiled at Grimshaw after shooting the victim, and decided to kill the victim because she had seen his face. The State then used these hearsay statements against Ramirez to argue in support of the aggravating factors.

The State agrees that this "type of testimony is normally not admissible in the penalty phase." (Answer Brief at 28.) However, the State maintains that this testimony was admissible in this case because of the testimony concerning the confession previously allowed in the guilt phase. We disagree. As discussed previously, Ramirez's questions of the deputy did not open the door to the admission of the details of the confession during the guilt phase, much less to the additional graphic and damaging

details admitted during the penalty phase. It is equally impermissible and violative of the defendant's constitutional rights in the penalty phase to allow the admission of the details of a non-testifying codefendant's confession where the defendant has not had an opportunity to confront or cross-examine that witness. See Gardner v. State, 480 So. 2d 91, 94 (Fla. 1985); see also Walton v. State, 481 So. 2d 1197, 1200 (Fla. 1985). Thus, even if we were not reversing for a new guilt phase, we would be compelled to reverse, at the very least, for a new penalty phase.

ERRORS IN THE SENTENCING ORDER

While declining to address proportionality at this time, we point to two deficiencies in the sentencing order.[9] First, the trial court gave Ramirez's age "little weight," despite the fact that Ramirez was only one month over the age of seventeen at the time of the crime, and even though there was uncontroverted evidence of his emotional, intellectual and behavioral immaturity. In addition, although the trial court acknowledged that Ramirez had no significant history of prior criminal activity, it found that this factor did not deserve "significant weight" because Ramirez had been prosecuted as a juvenile for a prior auto burglary.[10]

In regard to Ramirez's age the trial court found:

> At the time this murder was committed, the defendant was seventeen years old. Relevant expert testimony in this regard indicates that the defendant is more immature emotionally, intellectually and behavior-wise than his chronological age, but there was no evidence that he was, or is, in any way retarded or has a sub-normal I.Q. The

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[9] We reject Ramirez's contention in his third point on appeal that there was insufficient evidence to support the finding that the murder was cold, calculated and premeditated (CCP), and that the aggravating circumstances of commission to avoid arrest and CCP had to be merged. See Jennings v. State, 718 So. 2d 144 (Fla. 1998); Stein v. State, 632 So. 2d 1361 (Fla. 1994).

[10] See supra note 4.

defendant's age at the time of he crime, while a mitigating factor, is given little weight.

We have explained that "age is simply a fact, every murderer has one." Echols v. State, 484 So. 2d 568, 575 (Fla. 1985) (defendant was fifty-eight years old at the time of the crime). However, while we noted in Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986), that the defendant's age of twenty, without more, was not significant mitigation, we have held that when the murder is committed by a minor, the mitigating factor of age must be found and given "full weight." Ellis v. State, 622 So. 2d 991, 1001 n.7 (Fla. 1993) (emphasis supplied). "[T]he weight can be diminished by other evidence showing unusual maturity." Id. at 1001; see also Shellito v. State, 701 So. 2d 837, 843 (Fla. 1997), cert. denied, 118 S. Ct. 1537 (1998). Compare Mahn v. State, 714 So. 2d 391, 400 (Fla. 1998) (finding that the trial court abused its discretion in refusing to consider defendant's age of twenty as a statutory mitigating factor in light of the fact that Mahn had an "extensive, ongoing, and unrebutted history of drug and alcohol abuse, coupled with lifelong mental and emotional instability"); with LeCroy v. State, 533 So. 2d 750, 758 (Fla. 1988) (finding that the weight of the mitigating factor was diminished by LeCroy's unusual mental and emotional maturity).

In this case there was no evidence to suggest unusual maturity such that the weight of this mitigator should have been diminished. See Ellis, 622 So. 2d at 1001. To the contrary, the evidence revealed that Ramirez was immature for his age. Ramirez had the emotional, intellectual and behavioral maturity of a thirteen- or fourteen-year-old, and suffered from learning disabilities that evidenced an "organic problem" in his brain. Moreover, Ramirez's youth is linked not only with his emotional and intellectual immaturity, but also with his unrebutted history of "huffing."[11] See Mahn, 714 So. 2d at 400; Urbin v. State, 714 So.

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[11] According to testimony, "huffing" is the inhalation of chloroflouorocarbons from an aerosol or spray pain can to produce a sensation of being "high." An empty aerosol can was found near the vehicle involved with the crime. There was substantial uncontroverted evidence that Ramirez engaged

2d 411, 418 (Fla. 1998). Therefore, we find that the trial court abused its discretion in giving "little weight" to the defendant's age at the time of the crime, despite the uncontroverted testimony of defendant's emotional, intellectual and behavioral immaturity. See Shellito, 701 So. 2d 843; Ellis, 622 So. 2d at 1001.

The trial court further erred in finding that the defendant's arrest as a juvenile for stealing a ten-dollar bill from the dashboard of a pick-up truck "militat[ed] against giving significant weight" to the mitigating factor that Ramirez had "no significant history of prior criminal activity." Adjudication on the juvenile arrest was withheld, and Ramirez successfully completed an alternative program. See supra note 4. The circumstances of the crime do not "militate against" giving this statutory factor "significant weight." The trial court abused its discretion in so finding. See Ellis, 622 So. 2d at 1001.

CONCLUSION

In conclusion, we find that the confession given prior to the written waiver should have been suppressed. We further find that the trial court erred in allowing the details of the codefendant's confession in both the guilt and penalty phases of the trial because the cross-examination did not open the door to the details of the hearsay statements of the non-testifying codefendant.

Accordingly, we reverse and remand for a new trial consistent with this opinion.

It is so ordered.

SHAW and PARIENTE, JJ., and KOGAN, Senior Justice, concur.

ANSTEAD, J., concurs with an opinion, in which SHAW and PARIENTE, JJ., and KOGAN, Senior Justice, concur.

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in huffing during the months before the murder.

WELLS, J., concurs in part and dissents in part with an opinion, in which HARDING, C.J., and OVERTON, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

ANSTEAD, J., concurring.

The record in this case reflects a blatant violation of the United States Supreme Court's holding in Miranda v. Arizona,[12] as well as a violation of Florida's statutory and case law requiring the police to immediately notify a minor's parents when the minor is taken into custody. The police conduct involved herein essentially turns Miranda on its head by interrogating first, and then issuing the Miranda warnings and contacting the parents after the minor defendant has incriminated himself. For that reason, I fully concur in the majority's opinion, and especially its reliance upon the United States Supreme Court's decision in Oregon v. Elstad, 470 U.S. 298 (1985). I write separately to emphasize that this case presents the precise scenario that the United States Supreme Court meant to protect against by adopting the Miranda rule, and that the Miranda violation was even more egregious here because the accused was a minor.

Initially, it is important to make clear that the circumstances surrounding the detention and interrogation of the minor defendant should be the focus for resolving the suppression issue, not the facts surrounding the murder, as suggested by the dissent. The senseless and tragic nature of the murder is conceded

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[12] Miranda v. Arizona, 384 U.S. 436 (1966). Every professional law enforcement officer is aware that the first thing the police must do in confronting a defendant is to "read him his Miranda rights." Indeed, the professional practice has become so institutionalized that all police officers are provided with Miranda cards which contain those rights. Before any interrogation can occur, police officers must carefully apprize the defendant again of his Miranda rights to ensure that any subsequent confession will not be suppressed if Miranda is not followed. In other words, all professional officers know that they are not allowed to interrogate first and tell a defendant of his rights afterwards.

by all, but invoking the grisly circumstances of the murder only invites an emotional response and adds confusion to the legal issue of whether Ramirez' confession should have been suppressed.

CIRCUMSTANCES OF CONFESSION

It goes without saying that Ramirez' pre-Miranda statements are inadmissible. However, the initial confession secured in violation of Miranda and the circumstances under which it was given are of critical importance in determining the voluntariness and ultimately, the admissibility of the post-Miranda statements. Further, as the majority points out and as the dissent appears to agree, Ramirez was in custody at the time police interrogation commenced. In fact, as pointed out by the majority, the police had an extraordinary amount of evidence against Ramirez and hence, an abundance of probable cause to arrest him at the time they went to his home.

Indeed, it is doubtful that there could be more probable cause than existed here. Incredibly, the police not only had the codefendant's statement directly implicating Ramirez, but also a police-designed and controlled verification of Ramirez' involvement from Ramirez' own mouth during a controlled telephone conversation the police set up with the codefendant. Under those circumstances the police were not free to avoid the strictures of Miranda by asserting "tongue-in-cheek" that they had no probable cause to believe Ramirez was involved in the murder.

PROBABLE CAUSE

The police first learned of Ramirez' involvement in the murder from Ramirez' co-felon, John Grimshaw, who confessed to the crime and also implicated Ramirez in the murder by identifying him as the actual shooter. The police followed up this confession by asking Grimshaw to call Ramirez while they secretly listened and controlled the conversation to verify Grimshaw's statement that Ramirez was involved. During the conversation, Ramirez inculpated himself by acknowledging familiarity with items stolen from the victims house: to wit, a gun, a couple of rings, and a pair of handcuffs. In other words, the staged

conversation directly verified Grimshaw's statement to police implicating Ramirez.

Following the telephone conversation, and without any attempt to locate or notify Ramirez' parents, the police went right to Ramirez' house to obtain the stolen items and the murder weapon discussed in the staged conversation. At the time, Ramirez' parents were not home. Upon arrival, the police, without even a wink at Miranda, confronted Ramirez and asked him for the items taken from the victim's house. They also informed him of their knowledge about the telephone conversation with Grimshaw. In response, Ramirez actually handed over one of the stolen rings. The police then asked Ramirez to take them to the location of the weapon used in the murder and the remaining stolen items, again without any Miranda warnings and without notifying his parents. Finally, after obtaining the incriminating materials from Ramirez, and again without attempting to notify his parents, the police "asked" Ramirez to come to the police station.

Upon arrival at the police station, Ramirez was immediately placed in an interrogation room. Thereafter, without notifying Ramirez of his right to remain silent or his right to an attorney, and without informing him that anything he said could be used against him, or attempting to notify his parents, the police interrogated Ramirez about the murder. After Ramirez admitted his involvement in the murder, the police finally, but even then half-heartedly, informed him of his Miranda rights. The trap was now sprung, and the police led the minor defendant to inculpate himself before informing him of his rights and thus violated Miranda.

THE LAW

This case is controlled essentially by the rule set out in Oregon v. Elstad, 470 U.S. 298 (1985), as well as the relevant Florida statutes governing parental notification when minors are taken into custody. Both the majority and dissenting opinion correctly cite Elstad for the proposition that a suspect who has once responded to unwarned, uncoercive questioning is not thereafter forever foreclosed from waiving his rights and

confessing after he has been given the requisite Miranda warnings. See Elstad, 470 U.S. at 318. Notwithstanding, the Court clearly stated that the subsequent statements may only be allowed when two important conditions are met: (1) the failure to administer the Miranda warnings was unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will; and (2) the unwarned statements are followed by a careful and thorough administration of the Miranda warnings. See id. at 309-11 (emphasis added). In determining whether the post-Miranda statements were voluntarily made, the "surrounding circumstances and the entire course of police conduct with respect to the suspect" must be examined. Id. at 318 (emphasis added). In reviewing the totality of the circumstances surrounding Ramirez's inculpatory statements, it is painfully obvious that neither factor set out by the Elstad Court was met in this case.

Critically here, for example, at the time the mandated Miranda warnings were finally administered, Ramirez had already been directly implicated by Grimshaw, and had admitted possession of inculpatory evidence and specifically confessed to being present with Grimshaw in the victim's house on the night of the murder. The police did not warn Ramirez of his rights at any point in this carefully orchestrated trap, nor did they meaningfully attempt to contact his parents, despite the actual knowledge that Ramirez was a minor. Indeed, it is conceded that the police had spent approximately an hour interrogating Ramirez before asking him how his parents could be reached, and then, ironically, informing him that they were required by law to notify them or his guardian. It is against this factual backdrop that the Miranda issue must be resolved.

In applying the first prong of Elstad here, it is important to keep in mind what the police knew at the time Ramirez was asked to go to the police station. As noted above, Grimshaw had already implicated Ramirez as the shooter and the police had verified Ramirez' involvement through the telephone conversation between Grimshaw and Ramirez. When Ramirez was initially approached by the police, the police asked about but did not attempt to notify his parents. Ramirez was then placed in an

interrogation room at a police station instead of a place more familiar to him, such as his home. More importantly, the police told Ramirez they knew that both he and Grimshaw had been involved and that they knew he was at the victim's house on the night of the murder. This evidence directly refutes the police story that Ramirez was only a possible witness at the time they picked him up and brought him in for interrogation. We must remember that the police had total control over the staged telephone conversation set up to verify Grimshaw's statement against Ramirez. Despite this, when Ramirez asked if he was under arrest, the detectives told him "no," even though, as previously stated, the police had an abundance of probable cause to arrest Ramirez at that time, and, indeed, he was never released from custody from that point on.

As to the second prong of Elstad, the dissent suggests that Elstad supports the admission of the subsequent confession in this case because there, the officers read Elstad his rights in much the same manner as the officers did in this case. See concurring and dissenting op. at 18, n.7. However, a proper reading of Elstad clearly does not support such a conclusion. First, in Elstad, the pre-Miranda statements were made in a completely different setting than the setting in this case. There, the statements were made in the respondent's home with his mother several steps away in the kitchen. Second, Elstad's parents knew at all times what was happening and that he was being taken to the police station for interrogation.

Of even greater significance, however, is the Supreme Court's specific observation that the officers did not exploit the unwarned admission to pressure the defendant into waving his right to remain silent. See Elstad, 470 U.S. at 316 (emphasis added). This case, in marked contrast, presents a blatant example of the police use of Ramirez' unwarned admissions to induce him to waive his rights and provide a more detailed confession. Immediately before the Miranda rights were read to Ramirez, Detective Jones purposefully minimized their significance and encouraged Ramirez to waive his rights by casually stating: "Why don't you let Nate know about his rights. I mean, he's already told us about going in the house and whatever. I don't think [the

Miranda warnings are] going to change Nate's desire to cooperate with us." This was followed by a quick recitation, for the first time and in an off-handed manner, of Ramirez' rights.

This purposeful sleight-of-hand passage over the Miranda hump (these rights aren't "going to change Nate's desire to cooperate with us."), was far from the "careful and thorough" administration of Miranda rights required by the Supreme Court in Elstad. In fact, the Elstad Court specifically stated that in that case the failure to read the Miranda rights initially could have been the result of confusion as to whether the brief exchange qualified as custodial interrogation, or it may have simply reflected the officer's reluctance to initiate an alarming police procedure before speaking to the mother. See id. at 315-16. However, in the instant case, the record supports no other conclusion than a concerted effort to nail down Ramirez' involvement in the crime before giving any Miranda warning, followed by an attempt to keep him talking since he had already told them about his involvement. What good would it do to stop then?

There can hardly be a more compelling and coercive practice to induce further admissions than that person's own prior confession. "A principal reason why a suspect might make a second or third confession is simply that, having already confessed once or twice, he might think that he has little to lose by repetition." Darwin v. Connecticut, 391 U.S. 346, 350 (1968) (Harlan, J. concurring in part and dissenting in part). Moreover, any person who does not know that any statement made before the waiver is not admissible will logically think that it is much worse to assert the right to remain silent after having already confessed. Fittingly, the record reflects that it was not until Ramirez had orally waived his rights and given a lengthy and detailed description of the murder that the detective finally produced for the first time a written waiver and for the first time carefully and thoroughly explained the minor defendant's rights. Under Miranda, of course, this was a little late.

NOTIFICATION OF PARENTS

As pointed out by the majority, the police conduct involved here would be improper even if the subject involved had been an adult. Notwithstanding, the ultimate fact is that this case involves a minor, not an adult, and as such, it requires special care. See Haley v. Ohio, 332 U.S. 596, 599 (1948) (holding that courts must take special care in scrutinizing the record in cases involving a confession by a juvenile) In Florida, the Legislature has gone to great lengths to provide special provisions and safeguards for minors who are taken into custody and who inevitably are at a greater risk to succumb to police influence and coercion. As part of these special provisions, Florida requires the police to immediately notify the parents of the child when taking the child into custody.

Specifically, section 39.037(2), Florida Statutes (1995), provides:

> When a child is taken into custody as provided by this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child. The person taking the child into custody shall continue such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to an intake counselor pursuant to s. 39.047, whichever occurs first. If the child is delivered to an intake counselor before the parent, guardian, or legal custodian is notified, the intake counselor or case manager shall continue the attempt to notify until the parent, guardian, or legal custodian of the child is notified.

This statute clearly requires that a person taking a child into custody shall initially and continuously attempt to notify the parents of that child. In the instant case, the officers clearly ignored the explicit provisions of this law. Although Detective Blum, who had gone to Ramirez' house, testified that he inquired where Ramirez' parents were when he first apprehended him, the videotape of the confession demonstrates that the police did not even mention his parents again until almost an hour into the interrogation when he had already confessed to the murder. Further, since they told Ramirez that the law requires parental notification, we are not left to wonder whether these particular officers had actual knowledge of their legal obligations and simply chose to ignore them. Again, this is in contrast to Elstad, where the purpose of parental notification was clearly served since Elstad's mother was present and knew that her son was being taken in for questioning.

The United States Supreme Court in Fare v. Michael C, 442 U.S. 707 (1979), a case dealing with the confession of a minor, declared that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." Id. at 724 (quoting Miranda, 384 U.S. at 475). The determination whether the juvenile knowingly and intelligently waived his privilege requires courts to consider the "totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." Id. at 725. This approach mandates

> inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and

> the consequences of waiving those rights.

Id. at 725. After considering these principles, the Court held that Michael C. voluntarily waived his rights where the police conducting the interrogation had taken special care to ensure that the defendant understood his rights and had fully and carefully explained to the defendant that he was being questioned for murder. See id. at 726. Further, there was no indication that the defendant was unable to understand his rights: he had considerable experience with the police, he was under full-time supervision with probation authorities, there was no indication that he possessed insufficient intelligence, and "[h]e was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit." Id. at 726-27.

The dissent's reliance on Fare is misplaced. The circumstances in Fare are clearly distinguishable and stand in stark contrast to what occurred here. First, the police in Fare apprised the juvenile of his rights and explained what those rights meant. Specifically, they told the juvenile "If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to." Id. at 710. More importantly, the juvenile in Fare had considerable experience with the police, had a record of several arrests, had served time in a youth camp and had been on probation for several years. See id. at 726. In comparison, Ramirez' sole contact with the police prior to his arrest consisted of an admission of guilt and an "adjudication withheld" in juvenile court for taking ten dollars from the dashboard of a pick-up through an open window.

Under Miranda, the courts are ultimately responsible for ensuring that the police do not ignore a defendant's fundamental constitutional rights. In analyzing this issue, courts must never lose sight of the important policy clearly enunciated in the Supreme Court's opinion in Miranda:

> [T]o respect the inviolability of the human personality, our accusatory system of criminal justice demands

> that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

Miranda, 384 U.S. at 460. In order to safeguard against this danger and ensure that any statement is freely made, the Court in Miranda required that the rendition of an accused's fundamental rights be given at the outset of any interrogation, not sometime thereafter when it is in the perceived best interest of the police to do so. See id. at 467-68. Of course, the present case represents the exception since the overwhelming majority of police officers recognize their professional obligation to uphold the law and not demean it. For all of these reasons, I concur with the majority that in order to uphold the well-known law established in Miranda, Ramirez' confession must be suppressed.

SHAW and PARIENTE, JJ., and KOGAN, Senior Justice, concur.

WELLS, J., concurring in part and dissenting in part.

I concur with part (2) of the majority opinion which concludes that the death sentence of Ramirez must be vacated in favor of a new penalty phase proceeding because of the error in allowing the detective's testimony as to John Grimshaw's statements. See Franqui v. State, 699 So. 2d 1332 (Fla. 1997). I express no opinion with respect to part (3) of the majority opinion, as I find the issues raised in that portion of the majority opinion to be moot.

I dissent from part (1) which concludes that the trial court committed legal error in denying Ramirez's motion to suppress a pretrial confession. The trial court found that a detective read Ramirez his Miranda rights; that Ramirez made a valid waiver of these rights; and that after waiving his rights Ramirez voluntarily made inculpatory statements. I find no reason to disturb this judgment. After reviewing the record of the hearing on the

motion to suppress, including the videotape of Ramirez's confession, I have come to the inescapable conclusion that the detectives acted in accordance with Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny.

I. Factual Background

The majority omits all but a summary factual statement of this burglary, rape, kidnapping, and, finally, murder of Mildred Boroski, a septuagenarian widow. A detailed version of the criminal episode and the events leading to the interrogation is necessary to place the conduct of the detectives who interviewed Ramirez into context. This criminal episode took place between midnight and 7 a.m. on March 11, 1995. The two participants in the crime were John Grimshaw and Ramirez, both age seventeen at the time of the crime and the subsequent police interrogation. Grimshaw was the elder of the two.

Ms. Boroski lived alone in a retirement village in Pasco County. Her late husband had been a police chief in the state of Ohio. Ms. Boroski had a .38 caliber service revolver and a pair of handcuffs; both had belonged to her husband. She kept both the revolver and the handcuffs in her bedroom. Grimshaw lived in a house across the street from Ms. Boroski. Ramirez lived with his father and stepmother in the same retirement village as Ms. Boroski.

At around midnight on March 11, 1995, Grimshaw and Ramirez climbed over a fence into Ms. Boroski's backyard and cut the exterior phone lines. Next, they cut through a screen door and gained access to a porch. Ramirez then broke the glass out of a window with the use of a crowbar. Grimshaw and Ramirez, both wearing gloves, climbed into the house through this window.

Ramirez took a knife from one of the drawers in the kitchen. When the two went into the room where Ms. Boroski was sleeping, her small dog started barking and came at Ramirez. Ramirez hit the dog with the crowbar he was carrying. The force of the blow killed the dog instantly, causing it to defecate all over the room. Ms. Boroski awoke. Grimshaw told her to shut up and

then tied Ms. Boroski, who was lying on her stomach, to the bed with phone cords. Ramirez assisted in restraining Ms. Boroski.

Grimshaw took two rings Ms. Boroski was wearing. Ramirez took the gun and the handcuffs which were in Ms. Boroski's bedroom. Ramirez stated that Grimshaw then raped Ms. Boroski. The duo then placed Ms. Boroski in her car along with her dead dog. Ramirez, along with Grimshaw, drove that car to an open field. Once at the open field, they marched Ms. Boroski approximately 200 feet into the field, where she was told to lie down. Ramirez fired two shots into Ms. Boroski's head, killing her.

Grimshaw and Ramirez then drove Ms. Boroski's car into a wooded area and walked back to Grimshaw's house. Ramirez threw the keys to the car into a lake, and the keys were later found by a person fishing. Ramirez hid the gun used to murder Ms. Boroski under the mattress of his waterbed. Ramirez's stepmother discovered the gun as well as a second gun. Ramirez's father told him he did not want the guns in the house, so Ramirez temporarily gave the guns to a friend named Rodney. Rodney, who was on probation, reluctantly accepted the guns. Ramirez gave the handcuffs to his girlfriend. In addition to the rings, Grimshaw and Ramirez took a few dollars and some change from Ms. Boroski's purse. The two spent the money on video games the next day.

Ms. Boroski's car was located on March 11, 1995. A deputy sheriff went to Ms. Boroski's home the next day and discovered signs of the forced entry. Upon entering the home, the deputy noticed that every telephone was either missing or disconnected. The bedroom had been ransacked. There was evidence of blood and fecal matter. A crime team was dispatched to the house. Grimshaw saw the crime team and approached one of the crime technicians, offering to help the investigators search for Ms. Boroski. Grimshaw led investigators on a search that lasted a couple of hours, but the body was not located.

Ms. Boroski's body was discovered on March 14, 1995. Ms. Boroski was lying on her back with a pillow under her head and another on top of her head. A pillow case was covering her

head. She was barefoot and wearing a white nightgown. The nightgown was hiked up above her genital area, and her underwear was cut around the crotch area. Her wrists were bound with what was identified as two different types of telephone cord. Her anal and vaginal areas showed bruising consistent with a sexual assault.

Grimshaw soon thereafter became a suspect in the investigation. On May 3, 1995, Grimshaw was taken into custody and interviewed at the Sheriff's office for more than five hours. Grimshaw gave varying accounts of what transpired on the morning of March 11, 1995. He told a detective that Ramirez had some of Ms. Boroski's property. To verify this allegation, police had Grimshaw call Ramirez. The conversation was recorded by investigators.

In the recorded telephone conversation, Ramirez acknowledged possessing some of Ms. Boroski's property:

> [Grimshaw:] You didn't happen to get that gun back from Ronnie, did you?
>
> [Ramirez:] Not yet.
>
> . . . .
>
> [Grimshaw:] . . . Did you ever give that ring to Christy [Ramirez's girlfriend] yet?
>
> [Ramirez:] No. It won't fit her.
>
> . . . .
>
> [Ramirez:] . . . I don't know where the single-stone ring is. I lost that one. The one with the three stones in it, I have that. . . .
>
> . . . .
>
> [Grimshaw:] The handcuffs[?]
>
> [Ramirez:] Christy got those.

Following this conversation, Detective Blum was dispatched to Ramirez's home to retrieve the property and to have Ramirez brought down to the Pasco County Sheriff's Office. The lead detective affirmatively testified that, before sending Detective Blum to Ramirez's home to retrieve the property, he did not consider Ramirez a suspect in Ms. Boroski's murder. He sent

Detective Blum to retrieve the stolen property and to find out what information Ramirez had.

Detective Blum testified that he went to the home and informed Ramirez that he had been instructed to pick up certain items that Grimshaw had placed in his custody: namely, two rings, a set of handcuffs, and a firearm. Ramirez was hesitant at first. The detective told Ramirez that the conversation between himself and Grimshaw had been recorded. Ramirez then surrendered one ring and stated that the other ring was lost. Ramirez told the detective that he had given the handcuffs to his girlfriend and that he had given the firearm to a friend. The detective, along with Ramirez, retrieved the handcuffs from Ramirez's girlfriend and the firearm from Ramirez's friend.

Detective Blum testified that he inquired from Ramirez as to the location of his parents and was told by Ramirez that his parents were at work. When Ramirez arrived at the sheriff's office, he was taken to an interrogation room, where he was immediately interviewed.[13] The entire interview, which lasted two hours, was videotaped. The videotape of the confession was introduced at the suppression hearing.

Ramirez was interviewed by Detectives Bousquet and Jones, Bousquet being the predominant interrogator. Bousquet testified that he did not read Ramirez his Miranda rights at the very beginning of the interview because at that time Ramirez was not a suspect. Approximately five minutes into the interview, after Ramirez admitted in conclusory fashion to being in Ms. Boroski's home on the night of the murder but before admitting to

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[13] The majority states, "Once transported to the station, Ramirez was placed in a small room and questioned by two other detectives." Majority op. at 4. The videotape belies the impression left by this statement. The interrogation room appears to be a rather normal size interrogation room. Although two detectives were often in the room, only one of the detectives actually questioned Ramirez. The second detective asked minimal questions other than in an attempt to locate Ramirez's parents.

killing her, Bousquet warned Ramirez of his Miranda rights.[14] It was not until after Bousquet read Ramirez his rights and after Ramirez acknowledged that he still wanted to speak with the detectives that Ramirez discussed in detail how he and Grimshaw broke into Ms. Boroski's home, killed Ms. Boroski's dog, tied Ms. Boroski to her bed, raped Ms. Boroski, stole her property, kidnapped Ms. Boroski, and then, finally, marched Ms. Boroski 200 feet into an open field and shot her twice in the head. After going through an initial version of the episode, Ramirez was asked to sign a voluntary waiver for a search of his room in his house and a written waiver of his Miranda rights. Ramirez signed both documents and thereafter continued with more sordid details about the criminal episode.

At the hearing on the motion to suppress, the trial court heard live testimony from Detective Blum and Detective Bousquet and viewed the videotape of the interview. At the end of the evidence and argument, the trial judge denied Ramirez's motion to suppress:

> It appears to the Court that at first, this defendant was a potential witness to the Grimshaw case, and as soon as it appears that he might have some involvement, they quickly gave him Miranda. At all times during his questioning, he spoke clearly and logically and did not appear to be under any stress.
>
> The striking is characterized by the defense attorney. I'll agree it could be called slapping. I don't think it was that prevalent. I think you can analogize it to a coach encouraging one of the kids on his baseball team by whacking him on the butt

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[14] I do not agree with what I consider to be the harsh criticism in the concurring opinion of law enforcement conduct. Rather, I believe that law enforcement's use of videotape for this interview is procedure which should be encouraged and is a demonstration of good faith on the part of law enforcement. The trial court viewed this tape and reached a conclusion precisely to the contrary of the majority and Justice Anstead after also having the benefit of the live testimony of the officers.

or whatever, as kind of a form of encouragement. Obviously, the methodology used here by Detective Bousquet was to appear as a friend, and I think he carried that part of his role out very well.

They got water for this young man, they offered to get him some food at one point. He even put his arms around him after the young man had made his confession, so to speak. I think there may have been some genuine sympathy shown by the detective. I'd – no one likes to see a young boy get into trouble, but this is a very serious charge.

I saw no sign of what I would call abuse. This young man at no time appeared to be in fear or suffering in any way.

As far as Miranda, I agree the original Miranda could have been done more thoroughly, but I think at that point, it was done just to protect themselves because it appeared it might – could be that man could be implicated. And his physical affirmation and his verbal affirmation is as good as you'll find in most cases. The written affirmation is, and the consent to search later on, might even be superfluous. They certainly had enough information to get a search warrant if they wanted it without getting the consent signed by the young man.

The Court's impressed that this young man seems pretty clear-headed and seems to know pretty well what was going on during this. And then after he realized that he was in hot water, then he first kind of got sad, you might say. But I'll deny the motion to suppress.

II. Discussion

A. The Law on Confessions

Beginning in 1936 with Brown v. Mississippi, 297 U.S. 278 (1936), the Supreme Court judged the admissibility of confessions in state courts under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Wayne Lafave & Jerold H. Israel, Criminal Procedure § 6.1(c) at 292 (2d ed. 1992). The Court employed a totality-of-the-circumstances review of the record to determine whether the confession had voluntarily been given. See id.; see also Haynes v. Washington, 373 U.S. 503, 513-14 (1963); Chambers v. Florida, 309 U.S. 227, 228-29 (1940).

The Court in Miranda, relying upon the Self-Incrimination Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment,[15] held that statements made by a defendant during a custodial interrogation are inadmissible unless the defendant is informed of certain rights and freely decides to waive those rights.[16] The prophylactic Miranda rights are "'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" New York v. Quarles, 467 U.S. 649, 654 (1984) (quoting from Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

In reviewing the validity of a waiver, courts must utilize the same totality of the circumstances review used to determine whether a confession itself is voluntarily given. See Moran v. Burbine, 475 U.S. 412, 421 (1986); Sliney v. State, 699 So. 2d 662, 668 (Fla. 1997), cert. denied, 118 S. Ct. 1079 (1998). "The totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of

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[15] See Malloy v. Hogan, 378 U.S. 1 (1964).

[16] Before a custodial interrogation may begin, police must inform the suspect that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to have a lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Miranda, 384 U.S. at 479.

juveniles is involved." Fare v. Michael C., 442 U.S. 707, 725 (1979). Moreover, an express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver but is not inevitably either necessary or sufficient to establish waiver. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

The Supreme Court also has held that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings. Oregon v. Elstad, 470 U.S. 298, 318 (1985). In Elstad, the Supreme Court rejected the argument that the traditional exclusionary rule applicable to "fruits" of unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution is applicable to situations in which police officers during a custodial interrogation solicit incriminating statements without first advising the defendant of his Miranda rights.

Relying on Harris v. New York, 401 U.S. 222 (1971) (voluntary statements solicited from defendant in violation of Miranda may nevertheless be used to impeach defendant on cross-examination), and Michigan v. Tucker, 417 U.S. 433 (1974) (evidence secured by statements obtained in violation of Miranda does not render evidence inadmissible per se), the Court reasoned that it would be an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Elstad, 470 U.S. at 307-09.

B. Totality of the Circumstances Review

The majority opinion does not conclude that Miranda warnings were not given, as they were plainly shown on the videotape as having been given not once but t[illegible]e, or that the confession itself was involuntary. Rather, the thrust of the majority's decision to suppress Ramirez's pretrial confession is

based on a conclusion that the mannerisms of the lead detective, in light of Ramirez's age, rendered Ramirez's waiver of his Miranda rights involuntary. The record is devoid of any evidence whatsoever which would tend to support this conclusion.[17]

The State has the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of Miranda; the State need prove waiver only by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 167-68 (1986); Sliney, 699 So. 2d at 668.[18] I conclude that a fair and

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[17] It is difficult to understand whether the majority's decision is that the manner in which Bousquet administered the initial Miranda warnings rendered the initial waiver involuntary as a matter of law or whether the majority's decision is that the trial judge's determination that the waiver was voluntary was not based on competent, substantial evidence. In either event, the majority's opinion in this regard has no basis in fact or law. The majority recedes, sub silentio, from the long-standing rule of this Court that a trial court's ruling on a motion to suppress is presumptively correct. Escobar v. State, 699 So. 2d 984, 987 (Fla. 1997), cert. denied, 118 S. Ct. 1548 (1998); Medina v. State, 466 So. 2d 1046, 1049 (Fla. 1985).

[18] I take issue with the following statement by the majority:

> Moreover, where a confession is obtained after the administration of Miranda warnings, the State bears a "heavy burden" to demonstrate that the defendant knowingly and intelligently waived his or her privilege against self-incrimination and the right to counsel, especially where the suspect is a juvenile. Colorado v. Connelly, 479 U.S. 157, 167 (1986).

Majority op. at 13. To say that a party which bears the burden of production or the burden of proof by the preponderance of the evidence standard carries a "heavy burden" is a non sequitur. The more complete statement from Connelly states:

> Although we have stated in passing that the State bears a "heavy" burden in proving waiver, we have never held that the "clear and convincing evidence" standard is the appropriate one.
>
> . . . .
>
> We now reaffirm our holding in Lego [v. Twomey,

accurate review of the police investigation into this crime and the videotape of Ramirez's confession shows by a preponderance of the evidence no "lawless" or coercive conduct by the police so as to require that this otherwise indisputably voluntary confession be found inadmissible on the basis of an invalid waiver. See Connelly, 479 U.S. at 166-67. This was the clear decision of the trial judge at the suppression hearing, which I accept as to the facts and approve as to the law.

The concurring opinion accuses law enforcement of "purposeful sleight-of-hand passage over the Miranda hump." Concurring op. at 39. The majority states that in contrast to Elstad, "[w]hen the police finally administered the Miranda warnings [to Ramirez], the administration was not careful and thorough. To the contrary, there was a concerted effort to minimize and downplay the significance of the Miranda rights." Majority op. at 11. The apparent basis for these unwarranted statements stems from the colloquy between the detectives and Ramirez before Detective Bousquet read Ramirez his rights:

> [Detective Jones:] Why don't you let [Ramirez] know about his rights. I mean, he's already told us about going in the house and whatever. I don't think that's going to change [Ramirez's] desire to cooperate with us.
>
> [Detective Bousquet:] I'll go through all that with [Ramirez]. [Ramirez], I'm going to read you your rights and go through the case.
>
> [Ramirez:] I have a question. Am I like being placed under arrest?
>
> [Detective Bousquet:] No. I'm reading you your rights. [Ramirez], you have the right to

---

> 404 U.S. 477 (1972)]: Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our Miranda doctrine, the State need prove waiver only by a preponderance of the evidence.

Connelly, 479 U.S. at 167-68 (emphasis added; citations omitted).

remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him be present while you're being questioned. If you can't afford to hire a lawyer, one will be appointed to represent you during questioning, if you wish, if you decide, at any time to exercise your rights and not answer any questions or make any statements.

. . . [D]o you understand these rights as I've explained them to you?

[Ramirez:] (Indicating affirmatively).

[Detective Bousquet:] Having these rights in mind, do you wish to speak to me now about the case?

[Ramirez:] I guess. That's what I'm here for.

After Detective Bousquet warned Ramirez that he had the right to remain silent and had the right to counsel and after Ramirez affirmatively indicated that he did not wish to invoke these rights, Ramirez detailed the facts of this criminal episode.

In its analysis, the majority states that the instant case stands "in sharp contrast" to Fare v. Michael C., 442 U.S. 707 (1979), a case in which the Supreme Court reviewed the validity of a Miranda waiver by a juvenile defendant. Contrary to the majority, I find that the two cases are fairly similar and that Fare supports affirmance, not reversal, of the trial court's order. In Fare, the juvenile defendant, who was sixteen and one-half years old at the time of his interrogation, challenged a ruling denying his motion to suppress a confession on the basis that his waiver of Miranda was the product of police coercion. The Supreme Court rejected this argument.

The following colloquy taken from the state court opinion represents the extent of the defendant's waiver of his Miranda rights:

On February 4, 1976, police interrogated defendant at the Van Nuys police station. After

advising defendant of his Miranda rights, the police interrogating officer continued the conversation as follows:

> Q. . . . Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. Can I have my probation officer here?
>
> Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.
>
> A. How I know you guys won't pull no police officer in and tell me he's an attorney?
>
> Q. Huh?
>
> A. (Repeat of last answer.)
>
> Q. Your probation officer is Mr. Christiansen.
>
> A. Yeah.
>
> Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to

> talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?
>
> A. Yeah.
>
> Q. Okay, will you talk to us without an attorney present?
>
> A. Yeah I want to talk to you." (Emphasis added.)

In re Michael C., 579 P.2d 7, 8 (Cal. 1978), reversed, Fare v. Michael C., 442 U.S. 707 (1979).

In analyzing the issue of waiver, the Supreme Court stated that the totality of the circumstances test used for adults was to be used with juvenile confessions as well. The Court included the following factors for consideration, "the juvenile's age, experience, education, background, and intelligence." Id. at 725. After considering the relevant factors, the Supreme Court concluded:

> We feel that the conclusion of the Juvenile Court was correct. The transcript of the interrogation reveals that the police officers conducting the interrogation took care to ensure that respondent understood his rights. They fully explained to respondent that he was being questioned in connection with a murder. They then informed him of all the rights delineated in Miranda, and ascertained that respondent understood those rights. There is no indication in the record that respondent failed to understand what the officers told him. Moreover, after his request to see his probation officer had been denied, and after the police officer once more had explained his rights to him, respondent clearly

> expressed his willingness to waive his rights and continue the interrogation.
>
> Further, no special factors indicate that respondent was unable to understand the nature of his actions. He was a 16½ -year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit.
>
> On these facts, we think it clear that respondent voluntarily and knowingly waived his Fifth Amendment rights.

Id. at 726-27.

A review of the videotape reveals that there is no material difference between the way the officers in Fare administered the Miranda warnings and secured a waiver and the way the detectives in the instant case accomplished the same.[19] In an attempt to distinguish Fare, the majority makes an incredulous leap of logic in stating that Detective Jones' statement, "I mean, he's already told us about going in the house and whatever. I don't think [the Miranda warnings are] going to change [Ramirez's] desire to cooperate with us," somehow renders an otherwise voluntary confession inadmissible because it minimizes the significance of Miranda. As in Moran, the record here "is devoid of any

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[19] The majority's statement that Elstad requires reversal is similarly strange. That opinion shows that the officers read Elstad his Miranda rights and secured a wavier in much the same fashion as did the detectives in the instant case. Elstad, 470 U.S. at 315 n.4.

suggestion that police resorted to physical or psychological pressure to elicit the statements." Moran, 475 U.S. at 421.

In Colorado v. Connelly, 479 U.S. 157, 170 (1986), the Supreme Court stated that "[t]he voluntariness of a waiver of [the Miranda] privilege has always depended on the absence of police overreaching, not on 'free choice' in any broader sense of the word." The record in no way supports the factually baseless assertion that Ramirez's waiver was the product of "police overreaching" or "cajoling" or "trickery." Rather, the record contains competent, substantial evidence to support the trial court's legal conclusions. See Escobar v. State, 699 So. 2d 984, 987 (Fla. 1997).

I do not understand what more the majority would have required of Detectives Bousquet and Jones. As Justice Kogan wrote for a unanimous Court in Johnson v. State, 660 So. 2d 637 (Fla. 1995):

> Police are not required to disclose every possible ramification of a waiver of rights to a detainee apart from those general statements now required by Miranda and its progeny. Nor are police required to tell detainees what may be in their personal best interests or what decision may be the most advantageous to them personally. Under our system, law enforcement officers are representatives of the state in its efforts to maintain order, and the courts may not impose upon them an obligation to effectively serve as private counselors to the accused. The latter is the obligation of private attorneys or public defenders and certainly must not be shouldered by those whose job it is to police our streets.

Id. at 642. It is very significant to this analysis that the interview of Ramirez was videotaped. This is a fact which should militate against exclusion of the evidence. Such videotaping ensures against extracting confessions by way of physical or psychological coercion, which is what the constitution prohibits. To exclude this

confession because of the mannerisms used by the detectives in the interview, which can only be categorized as valid police techniques, will only serve to deter the videotaping of such interviews, which is contrary to the reasoning underlying the exclusionary rule.[20]

The majority decision also relies heavily on the fact that Ramirez was only seventeen at the time of the interrogation, he had limited experience with the criminal justice system, and his parents were not notified before the interrogation began. Majority op. at 16-17. I point out that the record reflects that on September 23, 1993, Ramirez was arrested and charged with burglarizing an automobile. Ramirez entered an admission of guilt and spent four days in secure detention, after which he was placed in home detention. Ramirez was also required to attend six sessions of a seminar entitled the "Consequences of Crime." How many arrests must a juvenile have before the majority of this Court would hold that the defendant is experienced in the criminal justice system? This opinion in reality creates considerable uncertainty as to whether a juvenile may validly waive his or her Miranda rights. Such an opinion is contrary to this Court's precedent in Doerr v. State, 383 So. 2d 905, 907-08 (Fla. 1980).

Moreover, there is no basis to refuse to accept Ramirez's statement of waiver as reflected in the videotape because in the middle of the second reading to him of the Miranda rights, Ramirez interrupted the reading and said, "I understand it." The

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[20] In Connelly, the Supreme Court stated:

> We have also observed that "[j]urists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence." . . . The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution.

Connelly, 479 U.S. at 166 (quoting United States v. Janis, 428 U.S. 433, 448-49 (1976)).

detective continued with the complete reading of the rights despite the fact that the videotape reflects an unequivocal statement by Ramirez that he already understood his rights. Ramirez's demeanor throughout the interview shows that he understood his rights.

The majority also places heavy stock in the fact that the detectives were not able to notify Ramirez's parents before the interrogation. Section 39.037(2), Florida Statutes (1995), states in pertinent part: "When a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child." (Emphasis added.)[21] In Doerr v. State, 383 So. 2d 905 (Fla. 1980), we held under a substantially similar provision that "[l]ack of notification of a child's parents is a factor which the court may consider in determining the voluntariness of any child's confession, but is not a statutory prerequisite to interrogation." Id. at 908. What this section requires is a reasonable attempt to notify a juvenile's parents in light of the attending circumstances.

Unexplainably, the majority states: "The State maintains that some attempts were made to contact Ramirez's parents earlier. However, the statute would be rendered meaningless if all that is required are perfunctory attempts to contact a juvenile's parents." Majority op. at 19. To label the State's attempts to find out from

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[21] Section 39.037(2), Florida Statutes (1995), provides:

> (2) When a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child. The person taking the child into custody shall continue such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to an intake counselor pursuant to s. 39.047, whichever occurs first. If the child is delivered to an intake counselor before the parent, guardian, or legal custodian is notified, the intake counselor or case manager shall continue the attempt to notify until the parent, guardian, or legal custodian of the child is notified.

Ramirez where his parents could be located as "perfunctory" ignores the sworn testimony in the record and the videotape which establish that questions were asked of Ramirez as to his parents' location, to which questions Ramirez answered he did not know. The trial court found, based upon the testimony of the detectives, that Ramirez's interrogation began as an inquiry as to Ramirez's knowledge as a potential witness. The majority ignores this finding of historical fact by the trial judge. This Court is not at liberty, according to its precedent, to reject factual findings by a trial court absent a finding of an abuse of discretion. Escobar v. State, 699 So. 2d 988, 993 (Fla. 1997). Moreover, Detective Blum, who went to Ramirez's house, testified that he tried to learn from Ramirez where his parents could be located. The majority ignores this testimony as well. In fact, at the end of the interrogation when the police again tried to learn his parents' whereabouts, Ramirez was not helpful. The detectives acted as diligently as possible under the circumstances of this case.

Finally, the majority relies on the fact that Detective Bousquet "belatedly" obtained a written waiver from Ramirez. Under Florida law, a written waiver is but a factor to be considered in a totality of the circumstances review. See Sliney v. State, 699 So. 2d 662 (Fla. 1997). The purpose of a waiver is to ensure that a defendant understands the rights he is waiving. In an instance in which there is no videotape, a written acknowledgment of the Miranda rights substantiates the fact that there was a reading of the rights and an affirmative statement that the interrogation voluntarily proceeded following the reading. The videotape here plainly illustrates that the Miranda rights were read and that Ramirez agreed to proceed notwithstanding. In Sliney there was no such video–only the testimony of two police officers–and failure to obtain the written waiver was not fatal to the admissibility of the confession. Id. at 669. Certainly, in this case, failure to obtain an initial written waiver should not be fatal to admissibility in light of the videotape.

In sum, the totality of the factors here do not show police overreaching. The situation here is that the police investigation into the brutal murder of Ms. Boroski led law enforcement to Ramirez as having possession of some of the widow's property.

It was certainly reasonable for law enforcement to attempt to obtain information as to how Ramirez came into possession of the property. A viewing of the videotape belies the impression left by the majority opinion that the interrogation went on a long time before Ramirez was read his rights. The videotape further belies the impression left by the majority opinion that any undue physical or psychological coercion was used in this investigation.

Certainly, most criminal suspects would be better advised not to waive their Miranda rights, but our cases permit waiver because the Courts recognize that admissions of guilt are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. Moran, 475 U.S. at 424; see Traylor v. State, 596 So.2d 957, 965 (Fla. 1992). As Justice Frankfurter stated almost four decades ago:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains–if police investigation is not to be balked before it has fairly begun–but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

Culombe v. Connecticut, 367 U.S. 568, 571 (1961). Ramirez, for whatever undisclosed reason he had in his own mind, told the detective the truth of what occurred in the criminal episode. Excluding the instant confession is not in the interests of society or justice. On the other hand, the majority places the interest of society in having this abhorrent crime punished in substantial and unnecessary peril.

HARDING, C.J., and OVERTON, Senior Justice, concur.

An Appeal from the Circuit Court in and for Pasco County,

Craig C. Villanti, Judge - Case No. 9501073CFAWS-4

James Marion Moorman, Public Defender, and Robert F. Moeller, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Robert A. Butterworth, Attorney General, and Candance M. Sabella, Assistant Attorney General, Tampa, Florida,

for Appellee

SUPREME COURT OF FLORIDA
MONDAY, SEPTEMBER 13, 1999

NATHAN JOE RAMIREZ,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 89,377
	*	
STATE OF FLORIDA,	*	Circuit Court No.
	*	9501073CRAWS-4
Appellee.	*	(Pasco)
	*	
* * * * * * * * * * * * * * * *	*	

Appellee's Motion for Rehearing is hereby denied.

SHAW, ANSTEAD, and PARIENTE, J.J., and KOGAN, Senior Justice, concur.
HARDING, C.J., and WELL, J., and OVERTON, Senior Justice, dissent.

A True Copy
TEST:

TC
cc: Hon. Jed Pittman, Clerk
Hon. Craig C. Villanti, Judge

Mr. Robert F. Moeller
Ms. Candance Sabella
Mr. Bernie McCabe

Debbie Causseaux
Acting Clerk, Supreme Court

SUPREME COURT OF FLORIDA
FRIDAY, OCTOBER 8, 1999

NATHAN JOE RAMIREZ,	*	
	*	
Appellant,	*	
	*	
v.	*	CASE NO. 89,377
	*	
STATE OF FLORIDA,	*	Circuit Court No.
	*	9501073CRAWS-4
Appellee.	*	(Pasco)
	*	
* * * * * * * * * * * * * * * * *	*	

Appellee's Motion for Stay of Proceeding is hereby granted and proceedings in this Court and in the Circuit Court of the Sixth Judicial Circuit in and for Pasco County, Florida are hereby stayed to and including October 13, 1999, to allow appellee to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy
TEST:

TC
cc: Hon. Jed Pittman, Clerk
Hon. Craig C. Villanti, Judge

Mr. Robert F. Moeller
Ms. Candance Sabella
Mr. Bernie McCabe

Debbie Causseaux
Acting Clerk, Supreme Court

THE COURT: All right. I agree the totality of the circumstances. It appears to the Court that at first, this defendant was a potential witness to the Grimshaw case, and as soon as it appears that he might have some involvement, they quickly gave him Miranda. At all times during his questioning, he spoke clearly and logically and did not appear to be under any stress.

The striking is characterized by the defense attorney. I'll agree it could be called slapping. I don't think it was that prevalent. I think you can analogize it to a coach encouraging one of the kids on a baseball team by whacking him on the butt or whatever, as a kind of a form of encouragement. Obviously, the methodology used here by Detective Bousquet was to appear as a friend, and I think he carried that part of his role out very well.

They got water for this young man, they offered to get him some food at one point. He even put his arms around him after the young man had made his confession, so to speak. I think there may have been some genuine sympathy shown by the detective. I'd -- no one likes to see a young boy get into trouble, but this is a very serious charge.

I saw no sign of what I would call abuse. This young man at no time appeared to be in fear or suffering in any way.

As far as Miranda, I agree the original Miranda could have been done more thoroughly, but I think at that point, it was done just to protect themselves because it appeared it might -- could be that man could be implicated. And his physical affirmation and his verbal affirmation is as good as you'll find in most cases. The written affirmation is, and the consent to the search later on, might even be superfluous. They certainly had enough information to get a search warrant if they wanted it without getting the consent signed by the young man.

The Court's impressed that this young man seems pretty clear-headed and seems to know pretty well what was going on during this. And then after he realized that he was in hot water, then he first kind of got sad, you might say. But I'll deny the motion to suppress.

(VOL X, R 1548-49)

Supreme Court, U.S.
FILED
DEC 8 1999
CLERK

(2)

Case No. 99-795

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1999

STATE OF FLORIDA,

Petitioner,

vs.

NATHAN JOE RAMIREZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

PRELIMINARY STATEMENT

The Petition filed herein by the State of Florida incorrectly states that it is a "Petition for Writ of Certiorari to the Supreme Court of the United States." The Petition should properly be directed to the Supreme Court of Florida, as it is that Court's judgment which the State seeks to have this Court review. See ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 6.21 (7th ed. 1993).

References to the Appendix contained in the State's Petition will be indicated by the letter "A" followed by the appropriate page number(s).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

STATE OF FLORIDA, Petitioner,

v.

NATHAN JOE RAMIREZ, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Respondent, Nathan Joe Ramirez, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Supreme Court of Florida in this case.

JURISDICTION

This Court lacks jurisdiction to review the decision of the Supreme Court of Florida in this case, as the decision rests upon an adequate and independent state ground, primarily the Constitution of the State of Florida, as will be discussed further below in the section entitled "Reasons Why the Petition Should Be Denied."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited in the State's Petition, the following constitutional and statutory provisions are involved in this case:

Article I, § 16(a) of the Constitution of the State of Florida provides in pertinent part:

> In all criminal prosecutions, the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed.

Section 39.037(2), Florida Statutes (1995) provides:

> When a child is taken into custody as provided in this section, the person taking the child into custody shall attempt to notify the parent, guardian, or legal custodian of the child. The person taking the child into custody shall continue such attempt until the parent, guardian, or legal custodian of the child is notified or the child is delivered to an intake counselor pursuant to s. 39.047, whichever occurs first. If the child is delivered to an intake counselor before the parent, guardian, or legal custodian is notified, the intake counselor or case manager shall continue the attempt to notify until the parent, guardian, or legal custodian of the child is notified.

STATEMENT OF THE CASE

The material facts surrounding the suppression of Respondent's statements to law enforcement, as set forth in the majority opinion below, are as follows (A-2-A-4--emphasis in original):

> The victim's body was found in an open field not far from her home. Her death was caused by two gunshot wounds to the head. The subsequent investigation revealed that someone had broken into her home and stolen some items of jewelry, her gun, and about $35. There was evidence that the victim had been raped before her death.
>
> [Jonathan] Grimshaw [who was also found guilty of first-degree murder in the instant homicide, but received a life sentence] who was the victim's neighbor, soon became a suspect. After several hours, Grimshaw confessed his involvement in the crime. Although Grimshaw gave several inconsistent versions of events, he eventually admitted his involvement in the crime, but pointed to Ramirez as the ringleader.
>
> In order to convince the police of the truthfulness of his statements regarding Ramirez's involvement, Grimshaw phoned Ramirez from the station while detectives listened in and recorded the call. During the call, Ramirez and Grimshaw discussed the items of physical evidence related to the crime that were in Ramirez's possession and made plans to destroy the victim's automobile to eliminate evidence of the crime.
>
> Ramirez was at home around three o'clock that afternoon when, shortly after the phone call, a sheriff's deputy arrived wearing a badge and carrying a firearm. The deputy asked Ramirez to produce the physical evidence in his possession linked to the murder, including the suspected murder weapon and some of the victim's jewelry. According to the deputy, Ramirez was a "little hesitant at first, [and] denied having the articles." After the deputy informed Ramirez that he knew about the phone conversation with Grimshaw, Ramirez turned over the items that were in the

house and accompanied the deputy to retrieve other items. The deputy then asked Ramirez if he would be "willing to come with [him] to the sheriff's office" to speak with a detective. Once transported to the station, Ramirez was placed in a small room and questioned by two other detectives.

The entire interrogation at the station was videotaped and is part of the record on appeal. The videotape reveals that the lead detective began the interrogation by questioning Ramirez about how the items came into his possession. When Ramirez initially claimed that Grimshaw gave him the items, one of the detectives informed Ramirez that:

> [R]esources indicate that you may have some involvement in the case....What I want you to do is I want you to be honest with me. The indication we have is that both you and John [Grimshaw] are involved....I want you to tell me what happened that night. I know you were there. I wouldn't be here if I didn't know that. You know what I'm saying?

After these statements by the detective, Ramirez admitted breaking into the victim's house the night of the murder.

It was only after this admission that the second detective suggested that Ramirez be informed of his Miranda rights. The detective said:

> Why don't you let Nate [Ramirez] know about his rights. I mean, he's already told us about going in the house and whatever. I don't think that's going to change Nate's desire to cooperate with us.

Ramirez then asked if he was "like being placed under arrest?" to which the other detective responded, "No, no, I'm just reading your rights at this time." After the Miranda rights were administered, Ramirez acknowledged what the detective had read by nodding and stating, "I guess that is what I'm here for."

Ramirez eventually admitted his involvement not only in the burglary, but also in the murder. He stated that he was the one who shot the victim, denied any involvement in the rape, and claimed that he was acting at Grimshaw's direction. Only after Ramirez fully confessed to the murder did the detectives belatedly obtain a written waiver of his Miranda rights. When Ramirez was asked to sign the waiver of rights form after he had fully confessed, the lead detective asked him to acknowledge that he had not been promised anything or been threatened before giving his statement. Ramirez's response was that the detective had only promised to be his friend.

REASONS WHY THE PETITION SHOULD BE DENIED

..."[T]his Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground,...as it will if the state court's opinion 'indicates clearly and expressly' that the state ground is an alternative holding [citations omitted][.]" Sochor v. Florida, 504 U.S. 527, 533 (1992). In its opinion herein, the Supreme Court of Florida made it clear that its decision was supported not only by the Federal Constitution, but by the Constitution of the State of Florida. The Court noted: "Both the United States and Florida Constitutions provide that persons shall not be "compelled" to be witnesses against themselves in any criminal matter. U.S. Const. amend V; Art. I, § 9, Fla. Const." (A-4) The Court further declared: "The protections enunciated in Miranda have been part of this State's jurisprudence for over a century pursuant to the Florida Constitution. See Traylor, 596 So. 2d at 964-66. [Footnote omitted.]" (A-5) Also significant is the fact that the Court cited the Traylor case, [Traylor v. State, 596 So. 2d 957 (Fla. 1992)], another confession case that was decided under the Florida Constitution, some eight times in its discussion of the suppression issue. (A-4, A-5, A-6, A-10, A-14)[1]

In its petition, the State very briefly addresses the issue of an adequate and independent state ground for the instant decision

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[1] In Traylor the Court expressed the principle that "[i]n any given state, the federal constitution represents the floor for basic freedoms; the state constitution the ceiling," 596 So. 2d at 962, which is fully applicable to this cause.

in a footnote on page 13. Petitioner acknowledges that "the Florida Supreme Court made reference to both the state constitution and state law," but cites Oregon v. Hass, 420 U.S. 714 (1975) in support of its assertion that this Court has jurisdiction. However, Hass is easily distinguishable from Respondent's case. In Hass, the decision of the lower court "did not rest on the Oregon Constitution or state law; neither was cited." 420 U.S. at 719 (emphasis supplied). As discussed above, the Florida Supreme Court not only cited; but specifically relied upon the Constitution of the State of Florida for its holding.

Respondent would also note that not only the Florida Constitution, but Florida statutory law as well, played a part in the Florida Supreme Court's decision. The failure of law enforcement to comply with the parental notification statute, section 39.037(2) of the Florida Statutes (1995), when the juvenile was taken into custody was part of the "totality of the circumstances" which the Court considered in ascertaining that Respondent's statements must be suppressed. (A-12-14)

Even if this Court had jurisdiction, Petitioner has not presented any compelling reason why it should exercise that jurisdiction. The instant opinion does not establish any new law or rule of broad applicability that is likely to affect many other criminal cases; only this Respondent's cause is affected by its holding.

The bulk of the State's argument as to why certiorari should be granted herein consists of a discussion of how the Florida

Supreme Court allegedly "misinterpreted and misapplied" three cases: Oregon v. Elstad, 470 U.S. 298 (1985), Fare v. Michael C., 442 U.S. 707 (1979) and Colorado v. Connelly, 479 U.S. 157, 167 (1986). (State's Petition for Writ of Certiorari, pp. 13-26) In this discussion, the State seems to quarrel more with the Florida Supreme Court's application of the rules of law set forth in these cases, rather than objecting to any particular statements of the principles expressed in the cases. However, "[a] petition for writ of certiorari is rarely granted where [as here] the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court of the United States, Rule 10.

The Supreme Court of Florida summarized the totality of the circumstances existing in this case which caused it to rule that Respondent's confession must be suppressed as follows (A-14):

> In this case, we stress that neither the veracity nor the credibility of the detectives is at issue, but only the uncontroverted facts, including: the fact that the detectives delayed administering the Miranda warnings until Ramirez made inculpatory admissions; the fact that no careful and thorough administrations of the Miranda rights occurred--instead, before administering the Miranda warnings the detective diluted their effect by downplaying their significance; the fact that when administering the warnings the detectives used Ramirez's previous unwarned inculpatory statements to suggest he would not invoke his rights; the fact that Ramirez was a juvenile, with little experience in the criminal justice system; the fact that his parents were not present when he was interrogated; and the fact that the waiver of rights was not in writing. Based on the totality of these circumstances, we find that the oral waiver was invalid as a

> matter of law. Accordingly, we conclude that the confession should have been suppressed.

There is nothing in the Court's decision that suppression was required under these facts which is contrary to the Federal Constitution or cases in which this Court has construed the Constitution. Furthermore, it was within the prerogative of the Florida Supreme Court to determine that exclusion of Respondent's statements was required under the organic law of the State of Florida, which may provide greater protection to those accused of crime than the Federal Constitution mandates. See, for example, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) and Cooper v. California, 386 U.S. 58 (1967).

It is interesting to note that the State suggests that the videotaping of the interview with Ramirez "should militate against exclusion of the evidence." (State's Petition for Writ of Certiorari, p. 17) On the contrary, the fact that the Supreme Court of Florida was in the unique position of being able to see and hear for itself exactly how the interview was conducted and how and when the Miranda warnings were belatedly and perfunctorily administered to Nathan Ramirez "should militate against" this Court overturning the Florida Supreme Court's well-considered opinion herein.

Finally, the decision of the Florida Supreme Court was not based solely on the erroneous admission into evidence of Respondent's statements to law enforcement. In considering an entirely separate issue, the Court also found error in the admission into evidence at both the guilt and penalty phases of Respondent's trial

of portions of the confession given by Respondent's nontestifying codefendant, Jonathan Grimshaw. (A-15-20) Thus, Respondent's conviction and sentence would be reversed and remanded for a new trial regardless of the disposition of Respondent's issue regarding the denial of his motions to suppress his own statements to the police.

CONCLUSION

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rules of the Supreme Court of the United States, Rule 10. The State has failed to demonstrate that this Court has jurisdiction, and that there are "compelling reasons" why it should grant the petition in this case. Respondent respectfully asks this Honorable Court to deny the State's petition for a writ of certiorari.

Respectfully submitted,

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